GENERAL ACCOUNTING OFFICE

OVERVIEW

Section 230 of the CAA directs a study of the application of the laws listed in section 230(b) of the Congressional Accountability Act (CAA) to, among others, the General Accounting Office (GAO) and its employees.[1] The study is to "evaluate whether the rights, protections, and procedures, including administrative and judicial relief," are "comprehensive and effective," and to "include recommendations for any improvements in regulations or legislation."[2] Section 230(b) of the CAA lists the eleven laws made applicable by the CAA to "covered" legislative branch employees and adds, for study, the General Accounting Office Personnel Act of 1980 (GAOPA).

In this section on GAO, the Board first reviews the rights, protections, procedures, and relief afforded to GAO employees under the GAOPA. The GAOPA provisions on discrimination, labor-management relations, and notification to employees affected by reduction in force (RIF) are discussed in the separate sub-sections on Title VII of the Civil Rights Act of 1964 (Title VII), Age Discrimination in Employment Act of 1967 (ADEA), Americans with Disibilities Act of 1990 (ADA), Chapter 71 of title 5, United States Code, relating to Federal Service Labor-Management Relations (Chapter 71) and Worker Adjustment and Retraining Notification Act (WARN). The GAOPA does not expressly address the remaining CAA laws -- Fair Labor Standards Act of 1938 (FLSA), Family and Medical Leave Act of 1963 (FMLA), Uniformed Services Employment and Reemployment Act of 1994 (USERRA), Employee Polygraph Protection Act of 1988 (EPPA), Occupational Safety and Health Act of 1970 (OSHA), and the public access provisions of the ADA -- which will be discussed separately as well.

To evaluate comprehensiveness and effectiveness of the rights, protections, procedures, and relief afforded to GAO employees under the laws listed in section 230(b), the study compares them with those available to other legislative branch employees under the CAA. In addition, where appropriate, the rights, protections, procedures and relief under the GAOPA and the eleven CAA laws are compared with those applicable in the executive branch under civil service law and with those afforded to employees in the private sector. Comments submitted by interested persons were reviewed, summarized, and have been considered in the Board's evaluations and conclusions.

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[1] As originally enacted, section 230 directed the Administrative Conference of the United States (ACUS) to conduct the study and submit it to the Board of Directors of the Office of Compliance, which would then transmit the study, together with the Board's comments, to the Congress and the instrumentalities by December 31, 1996. However, Congress amended section 230 in November of 1995 to transfer responsibility for conducting the study from the Conference to the Board. Section 309 of Pub. L. No. 104-53, 109 Stat. 538 (Nov. 19, 1995).

[2] Section 230(c) of the CAA, 2 U.S.C. 1371(c).

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (TITLE VII)

Substantive Rights

GAO and its employees are specifically covered by section 717, which is the provision of Title VII generally applicable to federal sector employees.[1] Under section 717(a), "[a]ll personnel actions affecting employees or applicants for employment" in covered agencies and offices "shall be made free from any discrimination based on race, color, religion, sex, or national origin." This provision has been understood to prohibit retaliation against an employee for asserting rights under Title VII.[2]

Regulations

The GAOPA provides that, as to discrimination matters, the PAB and the Comptroller General exercise the authority of executive branch agencies for GAO employees. Accordingly, the regulations of the Equal Employment Opportunity Commission (EEOC) expressly exclude GAO from coverage.[3] GAO's regulations establishing the GAO personnel management system restate the language in the GAOPA prohibiting discrimination,[4] and also define prohibited personnel practices, based on civil service law, to include discrimination "as prohibited under section 717 of [Title VII]" committed by a GAO employee with personnel authority.[5] In

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[1] 42 U.S.C. 2000e-16. The coverage of section 717 includes employees and applicants "in executive agencies as defined in section 105 of Title 5" of the U.S. Code. GAO comes within this statutory definition of an "executive agency." The definition of an "executive agency" in 5 U.S.C. 105 includes: an executive department, a government corporation, and an independent establishment. An "independent establishment" is further defined in 5 U.S.C. 104(2) to include: an "establishment in the executive branch" (with certain exceptions), and GAO. (This definition does not mean that GAO is in the "executive branch" of government, and, indeed, GAO is generally considered to be in the legislative branch.) Furthermore, section 201(c)(1) of the CAA amended Title VII to include GAO, by name, within the coverage of section 717.

[2] *See Tomasello v. Rubin*, 920 F.Supp. 4, 6-7 (D.D.C. 1996); *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1905, 1915 n.13 (D.C. Cir. 1985); *Porter v. Adams*, 639 F.2d 273, 278 (5th Cir. 1981).

[3] 31 U.S.C. 732(f)(2); 29 C.F.R. 1614.103(d)(2).

[4] 4 C.F.R. 7.2(a).

[5] 4 C.F.R. 2.5(a)(1). This corresponds to the prohibited personnel practices defined in civil (continued...)

addition, GAO and the PAB have each issued regulations governing the administrative processing of discrimination complaints.

Procedures

Administrative

With respect to anti-discrimination laws, including Title VII, the GAOPA withdraws GAO from the jurisdiction of executive branch agencies, and divides regulatory authority between the Comptroller General and the PAB. The GAOPA grants to the PAB the same authority over "oversight and appeals matters" as is exercised by executive branch regulatory agencies, including the EEOC and MSPB.[1] GAO management exercises the same authority as executive branch agencies have over them.

The GAO discrimination complaint process, similar to the executive branch agencies' discrimination complaint process, is established under GAO Order 2713.2.[2] A discrimination proceeding at GAO begins with a mandatory counseling period, and may also include, with the consent of the parties, a period of mediation, conducted by the agency's Civil Rights Office. After the counseling phase, the employee may file an individual complaint. Unless the Civil Rights Office dismisses the complaint, it develops a factual record by conducting its own investigation, including the collection of documents and testimonial evidence. (In the case of a class complaint, an outside hearing officer develops a record and conducts a hearing as part of the investigatory process before the agency makes its final decision.) After the investigation (or hearing), the Comptroller General or a designee issues a final decision on behalf of the agency. A reasonable amount of official time must be granted to an employee to participate in a proceeding, respond to an inquiry by the Civil Rights Office, or prepare a complaint. A GAO employee may designate another GAO employee as his or her representative, and that representative shall also be granted a reasonable amount of official time for the same purpose.[3]

Appeal to the PAB. An individual may file a charge with the PAB General Counsel either after a GAO agency decision has been issued on the complaint, or if more than 120 days have

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[5] (...continued)
service law at 5 U.S.C. 2302(b)(1)(A).

[1] 31 U.S.C. 732(f)(2)(A).

[2] The current version of the Order was issued on October 14, 1994, but GAO is circulating a draft revision, dated April 23, 1996.

[3] *See* GAO Order 2723.2, chap. 8, sec. 2, pages 27-28 (Oct. 14, 1994).

elapsed since the complaint was filed.[1] The General Counsel conducts an investigation, including gathering information and interviewing and taking statements from witnesses, refines the issues where appropriate, and attempts to settle the matters at issue. Following the investigation, the General Counsel provides the charging employee with a "Right to Appeal Letter," accompanied by a confidential statement of the General Counsel advising the charging party of the results of the investigation.[2] Whenever the General Counsel finds reasonable grounds to believe that the charging party's rights have been violated, the General Counsel represents the charging party unless that party elects otherwise.

In the case of a class complaint, a petition for review may be submitted directly to the Board, following a GAO decision rejecting or modifying the class action, or after a final GAO decision on the complaint, or if more than 180 days have elapsed, without a final GAO decision. A formal adjudicatory hearing is then held, ordinarily before a single Board member, who renders an initial decision, with appeal to the entire Board.[3] In the case of a class complaint, the Board may choose to render a decision without further hearing, based on the record of the hearing conducted under Order 2713.2.[4]

If an employee is affected by an appealable adverse action (defined as a "removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days (whether due to disciplinary, performance-based or other reasons))", which the employee alleges was due to prohibited discrimination, the employee may elect to file a complaint of discrimination with GAO or file a charge with the PAB General Counsel without having first filed a discrimination complaint with GAO.

Other Avenues of Enforcement. An EEO violation committed by a GAO employee with personnel authority constitutes a "prohibited personnel practice."[5] If information comes to the attention of the PAB General Counsel suggesting that a prohibited personnel practice may have occurred or is to be taken, the PAB General Counsel shall investigate and may recommend corrective action to GAO or petition the PAB for corrective action, may initiate disciplinary proceeding against a responsible employee, or (except in the case of a RIF) may request a stay

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1 The PAB's regulations establishing procedures for discrimination cases are codified at 4 C.F.R. 28.95-28.101.

2 *See* 4 C.F.R. 28.11-28.12.

3 *See* 4 C.F.R. 28.86 (hearings before non-Board members), 28.87 (hearings before Board members).

4 4 C.F.R. 28.97(d).

5 By a GAO employee "who has authority to take, direct others to take, recommend, or approve any personnel action." 4 C.F.R. 2.5.

from the Board.[1]

Additionally, any person or the PAB General Counsel may petition the PAB for enforcement of a final PAB order, including a final PAB order involving unlawful discrimination. PAB regulations provide that, upon receipt of a petition for enforcement, or of a report from the PAB's Solicitor indicating non-compliance, the PAB may initiate a PAB proceeding to determine whether there was non-compliance, and may then seek judicial enforcement of its order.[2]

PAB's Oversight Authority. Under the GAOPA, the PAB exercises oversight authority over the anti-discrimination program at GAO.[3] Such oversight includes requiring GAO to provide to the PAB, upon request, various plans, reports, and statistics, reviewing and evaluating the GAO's regulations, procedures, and practices in the anti-discrimination area. The PAB can require GAO to make any changes it determines are needed due to violations or inconsistencies with applicable anti-discrimination law.[4]

Judicial

Civil Action. Section 717 entitles executive branch employees, as well as GAO employees, to file a civil action and request a jury trial if the complaining party seeks compensatory damages.[5] Section 717 specifies that a civil action may be filed after a complaint has reached one of four stages in the administrative processing of the complaint: *(i)* after 180 days from filing the complaint with the employing agency if there is no final decision on the complaint, or *(ii)* within 90 days of receipt of notice of final action by the employing agency, or *(iii)* after 180 days from appealing to the EEOC if there is no final decision on the appeal, or *(iv)* within 90 days of receipt of notice of final decision by the EEOC.[6] However, there has been some uncertainty how this provision applies to GAO employees whose right of appeal is to the PAB, not the EEOC.

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1 *See* 4 C.F.R. 28.130-28.133

2 *See* 4 C.F.R. 28.88.

3 31 U.S.C. 732(f)(2)(A).

4 4 C.F.R. 28.91-28.92.

5 In any action brought under section 717 of Title VII, if a complaining party seeks compensatory damages under 42 U.S.C. 1981a, subsection (c) of that section authorizes any party to demand a jury trial.

6 42 U.S.C. 2000e-16(c).

The circumstances under which a GAO employee may file a civil action in district court under Title VII after having taken an appeal before the PAB were addressed by the U.S. Court of Appeals for the District of Columbia Circuit in *Ramey v. Bowsher*.[1] The Court in that case held that a GAO employee could not file a civil action in district court under Title VII after having received a final PAB decision. The Court found that the GAOPA forecloses filing a civil action after a GAO employee "invokes the Board's adjudicatory authority in a discrimination case." The Court did not, however, "address the issue whether in a discrimination case, a GAO employee may bypass the Board and proceed directly to district court."[2]

In response to the *Ramey* decision, the PAB withdrew its guidance as to when GAO employees might file a civil action, explaining: "The legal uncertainty highlighted by the *Ramey* case concerns whether GAO employees have any other options [besides asking the court of appeals to review a final PAB decision] for obtaining judicial consideration of their claims of discrimination. The PAB will leave that matter for resolution by the Courts."[3]

Judicial Review of Agency Administrative Processes. In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[4]

Relief

In the case of a violation of Title VII, the following relief may be available to a GAO employee: enjoining unlawful employment practices; ordering that such affirmative steps be taken as may be appropriate, including reinstatement or hiring, with or without back pay; and/or any other equitable relief as may be deemed appropriate.[5] Interest may be awarded to compensate for delay in payment. In addition, under 42 U.S.C. 1981a, compensatory damages are available for intentional discrimination. In such a case, compensatory damages for future pecuniary losses, emotional pain and suffering, and other nonpecuniary losses are

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1 *Ramey v. Bowsher*, 9 F.3d 133 (D.C. Cir. 1994).

2 9 F.3d at 136 n.6. A concurring opinion stated that a GAO employee has the option "either to sue his employing agency in district court, or to seek relief from the GAO's Personnel Appeals Board." 9 F.3d at 137.

3 59 Fed. Reg. 59103, 59105 (Nov.16, 1994). PAB had originally interpreted Title VII as affording GAO employees the same opportunities to file a civil action in district court as it affords to executive branch employees. *See* former PAB regulations, 4 C.F.R. 28.100(a), as promulgated at 58 Fed. Reg. 61988, 62005 (Nov. 23, 1993).

4 *See* 31 U.S.C. 732(f)(1), 753(a)(7), 755.

5 *See* 42 U.S.C. 2000e-5(g), which is made applicable by 42 U.S.C. 2000e-16(d).

capped at no more than $300,000.[1] If the employee prevails in a Title VII case, the court may, in its discretion, allow the employee reasonable attorney's fees (including expert fees) as part of the costs.[2]

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[1] *See* 42 U.S.C. 1981a(a)(1), 1981a(b)(2), 1981a(b)(3)(D).

[2] *See* 42 U.S.C. 2000e-5(k), which is made applicable by 42 U.S.C. 2000e-16(d).

THE GENERAL ACCOUNTING OFFICE PERSONNEL ACT OF 1980 (GAOPA)

The GAOPA was introduced in Congress at the request of the Comptroller General to grant GAO independence from regulation by executive branch agencies.[1] Before the GAOPA was enacted in 1980, GAO employees were subject to the provisions of law concerning pay, classification, appointment, and other matters applied to the executive branch. GAO was thus regulated in personnel matters by executive branch agencies, including the Office of Personnel Management (OPM), the Office of Special Counsel, and the Merit System Protection Board (MSPB), while, at the same time, responsible to Congress for examining, evaluating, and reporting on the programs and financial activities of these executive branch agencies. As explained in a Senate committee report describing the legislation that became the GAOPA, after the passage of the Civil Service Reform Act of 1978, GAO assumed added responsibility for monitoring executive branch personnel agencies and evaluating the effectiveness of programs established under the statute.[2] Congress therefore enacted the GAOPA to establish a self-contained personnel system for GAO, largely removing it from the regulation of OPM and other executive branch agencies. In addition, because the civil service laws were seen as "not readily accommodat[ing] the special needs of the GAO which arise from its unique status and responsibilities as an arm of the Congress," that system was to have "greater flexibility in hiring and managing its workforce without regard to civil service laws governing such matters as appointments, classifying and grading positions, compensation, adverse actions and appeals." Accordingly, the legislation gave "broad authority to the Comptroller General" in designing GAO's personnel system.[3]

Substantive Rights

The GAOPA requires the Comptroller General to "maintain a personnel management system" that confers rights in the subject areas of several of the laws made applicable by the CAA.[4] The

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1 *See* S. Rep. (Governmental Affairs Committee) No. 96-540 (Dec. 20, 1979), reprinted in 1980 U.S. Code Cong. and Admin. News 50-53.

2 *Id.*

3 *Id.* at 52.

4 A number of GAOPA provisions apply other rights, protections, and prohibitions of civil service laws. For example, the GAOPA requires that the GAO personnel management system must: include "merit system principles," provide for performance appraisals and adverse actions, veterans' preferences, and pay consistent with civil service pay systems, prohibit discrimination on the basis of marital status, political affiliation, refusal to engage in political

(continued...)

GAOPA both requires GAO management to protect employees against discrimination and preserves GAO employees' rights under applicable anti-discrimination laws. In other areas, the GAOPA requires GAO management to afford specified rights and protections based on provisions of civil service law such as merit system principles, veterans' preference, and prohibited personnel practices. The term "prohibited personnel practices" in civil service law encompasses a range of practices including unlawful discrimination, nepotism, violation of any law or rule relating to merit system principles, and retaliation against an employee for exercise of appeal rights granted by any law. Reprisal for disclosure of information ("whistleblowing") that the employee believes evidences a violation of any law also is prohibited. These prohibited personnel practices thus afford protections against retaliation that supplement whatever retaliation protection is applicable under particular anti-discrimination or other employment laws.[1]

Regulations and Orders

The basic substantive elements of the personnel management system required by the GAOPA were established by regulations promulgated by the Comptroller General in the Federal Register and codified in the Code of Federal Regulations.[2] These regulations restate the prohibition of unlawful employment discrimination, and the right of employees to form, join, or assist unions, or to refrain from doing so, in the same terms as are used in the GAOPA.[3] The prohibited personnel practices forbidden by GAO regulations now differ in some respects from civil service law, because GAO regulations were issued in 1980, and have not been amended to conform to amendments made to civil service law in 1989.[4] GAO has also issued Orders containing more detailed standards and procedures for certain elements of the personnel management system, including employment discrimination, labor-management relations, adverse actions, and a general administrative grievance procedure.[5]

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4 (...continued)
activity, or any conduct that does not adversely affect performance, forbid nepotism, and prohibit political practices prohibited under the Hatch Act. 31 U.S.C. 732.

1 4 C.F.R. 2.5(a).

2 4 C.F.R. parts 2 et seq.

3 4 C.F.R. 7.1(a), 7.2(a).

4 4 C.F.R. 2.4-2.5.

5 GAO Orders 2713.1 and 2713.2 (employment discrimination); Order 2711.1 (labor management relations); Order 2752.1(adverse actions); Order 2771.1, as amended by GAO Notice 2771.1 (A-92) (April 2, 1992) (administrative grievance procedure).

Procedures

Under the GAOPA, several procedural avenues are available to GAO employees to resolve employment-related disputes. The GAOPA retains many features of the federal employee dispute resolution system, itself complicated, and transfers authorities administered and enforced by the executive branch to GAO management and to the Personnel Appeals Board (PAB). The PAB has adjudicative and appellate authority, including authority over the appeal of discrimination cases, and appeals from agency decisions involving certain adverse actions and prohibited personnel practices, including retaliation.

Administrative Grievance Procedure

The GAOPA requires the GAO personnel management system to include comprehensive procedures for processing complaints and grievances.[1] Thus, the GAO established, by order, a general Administrative Grievance Procedure, which is broadly available to resolve any employee grievance in "a matter of concern or dissatisfaction relating to the employment of the employee(s) that is subject to the control of GAO management," but *not* including any discrimination complaint, which is handled by specialized procedures at GAO, and not including any matter appealable to the PAB.[2] The GAO order offers several examples of matters that might be resolved through the Administrative Grievance Procedure: official reprimands, suspensions from duty without pay for 14 days or less, inconsistent application of office policy, or nonselection for training.

Most complaints brought under the Administrative Grievance Procedure are presented first to the lowest level supervisor or manager who has authority to grant the requested relief, *i.e.*, ordinarily the immediate supervisor. Appeal is made to a higher-level manager, with further appeal to the Special Assistant to the Comptroller General, who has the discretion to use the fact finding services of an examiner. The examiner, who may be a GAO or contract employee, determines whether a hearing is necessary.

Personnel Appeals Board (PAB)

The GAOPA established the PAB as an independent office within GAO to adjudicate employee claims and appeals and perform oversight functions that, for the executive branch agencies, are performed by independent boards and agencies. The PAB is composed of five members appointed by the Comptroller General for a five-year term from a list of candidates submitted by an organization of individuals experienced in adjudicating or arbitrating personnel matters.[3] Current or former GAO officers or employees are ineligible. A member may not be reappointed,

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[1] 31 U.S.C. 732(d)(5).

[2] GAO Order 2771.1, as amended by GAO Notice 2771.1 (A-92) (April 2, 1992).

[3] 31 U.S.C. 751-755.

and may be removed only by a majority of the other PAB members, and only for inefficiency, neglect of duty, or malfeasance. The Board selects one of its own members as Chairman. The Chairman selects an individual, who is then appointed by the Comptroller General to be General Counsel of the PAB, and who serves at the pleasure of the Chairman.

The PAB has independent authority, including authority over appeals of EEO cases, appeals from agency decisions involving adverse actions, and adjudicative and appellate authority over prohibited personnel practices, including retaliation. The PAB also handles representation matters and certain claims and appeals involving labor-management relations.

Judicial

PAB decisions are subject to judicial review by appeal to the U.S. Court of Appeals for the Federal Circuit.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

Substantive Rights

GAO and its employees are covered by section 15 of the ADEA, the provision of the ADEA generally applicable to federal sector employees.[1] Furthermore, the CAA amended the ADEA to specifically include GAO within the coverage of section 15.[2] Under section 15, "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in covered agencies and offices "shall be made free from any discrimination based on age," and section 12(b) of the ADEA reiterates that the prohibitions established in section 16 "shall be limited to individuals who are at least 40 years of age."[3] The GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, including ADEA, reiterates those rights, and requires that they be protected by the GAO personnel management system.[4]

The law is unsettled as to whether the retaliation prohibition contained in section 4(d) of the ADEA[5] is made applicable to federal agencies by section 15 of the ADEA. Two recent decisions by federal district courts for the District of Columbia, where most GAO employees are located, have held that it does not.[6] It also is unclear whether the ADEA protections with respect to waivers -- under which any waiver of a right or claim requested by an employer must be "knowing and voluntary" and must be in exchange for valuable consideration -- applies to federal agencies, including GAO, under section 15 of the ADEA.[7]

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1 29 U.S.C. 633a.

2 Section 201(c)(2) of the CAA.

3 29 U.S.C. 631(b).

4 31 U.S.C. 732(f)(1)(A), (2).

5 29 U.S.C. 623(d).

6 Tomasello v. Rubin, 920 F. Supp. 4 (D.D.C. 1996); Koslow v. Hundt, 919 F. Supp. 18 (D.D.C. 1995).

7 The waiver provisions, in section 7(f) of the ADEA purport to apply to "any right or claim under this Act." 29 U.S.C. 626(f) ("any right or claim under this chapter [14 of title 29, which encompasses 29 U.S.C. 621-634]"). However, section 15(f) of the ADEA states that provisions outside of section 15 do not affect claims under section 15. 29 U.S.C. 633a(f).

THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) AND THE REHABILITATION ACT OF 1973

Substantive Rights

Section 509 of the ADA provides that the rights and protections under the entire ADA shall apply to certain congressional instrumentalities, including GAO.[1] Basic provisions with respect to employment discrimination are set forth in title I of the ADA,[2] although additional provisions are found elsewhere in the ADA. In general terms, the law prohibits employment discrimination against "a qualified individual with a disability" because of the disability.[3]

GAO takes the position that section 501 of the Rehabilitation Act, which prohibits discrimination on the basis of handicapping condition for employees in the executive branch, does not apply to GAO, an agency in the legislative branch.[4] However, with respect to the prohibitions against discrimination, the ADA and the Rehabilitation Act each contains cross-references to the other, so that their standards are in most respects substantially the same.[5]

Furthermore, the GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, reiterates those rights, and requires that they be protected by the GAO personnel management system.[6]

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1 42 U.S.C. 12209(1)-(2).

2 42 U.S.C. 12111-12117.

3 42 U.S.C. 12112 (a).

4 29 U.S.C. 791. The PAB has reserved judgment on this issue, because the GAOPA, as enacted, contains references specifically to the Rehabilitation Act. *See* statement of PAB, 58 Fed. Reg. 61988, 61990 (Nov. 23, 1993). These and other references to specific anti-discrimination laws are omitted from the GAOPA language that Congress codified in Title 31, U.S. Code. *See* 31 U.S.C. 732 (historical and revision notes).

5 29 U.S.C. 791(g); 42 U.S.C. 12201(a).

6 The GAOPA requires that personnel actions be taken without regard to "handicapping condition." The term "handicapping condition" is the term that was used in section 501 of the Rehabilitation Act before it was amended to conform to the ADA, which uses the term "individual with a disability."

Regulations

GAO's current regulations establishing the GAO personnel system restate the language in the GAOPA prohibiting discrimination, and also define prohibited personnel practices, based on civil service law, to include discrimination: "[o]n the basis of handicapping condition, as prohibited under section 501 of [the Rehabilitation Act]."[1] On August 28, 1996, GAO published a proposal to amend these regulations by striking references to the Rehabilitation Act and replacing them with references to the ADA.[2] In addition, GAO and the PAB have each issued regulations governing how they will handle ADA complaints, which are described below.

Procedures

Administrative

Section 509 of the ADA states that nothing in that section shall alter "the enforcement procedures for individuals with disabilities" provided in the GAOPA. Under the GAOPA, GAO provides the same administrative processes for ADA complaints as it provides for Title VII complaints (described above in the section on Title VII).

However, the CAA added a new paragraph (5) to section 509 of the ADA, providing that the "remedies and procedures" of section 717 of Title VII shall be available to employees of the congressional instrumentalities covered by section 509 who allege a violation of sections 102 through 104 of the ADA, including a GAO employee, except that the authorities of the EEOC are to be exercised by the head of the instrumentality.[3] Under section 717, the EEOC hears appeals from employing agencies' disposition of discrimination complaints, and has oversight responsibility of employing agencies' EEO programs. GAO management, in its comments, has stated that this provision appears inconsistent with the GAOPA, which provides that the PAB, not the Comptroller General, exercises the EEOC's authority over appeals and oversight matters.

Judicial

Civil Action

As noted above, paragraph (5) of ADA section 509, which was added by the CAA, states that the "remedies and procedures" of section 717 of Title VII shall be available to a GAO employee who alleges a violation of sections 102 through 104 of the ADA. Considered

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[1] 4 C.F.R. 2.5(a)(4). Apparently quoting from the GAOPA as enacted, this GAO regulation also states: "Nothing in this order shall be construed to abolish or diminish any right or remedy granted to employees of or applicants for employment in GAO— . . . (4) by sections 501 and 505 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794a) . . . ."

[2] 61 Fed. Reg. 44187 (Aug. 28, 1996).

[3] 41 U.S.C. 12209(5), as added by section 201(c)(3)(E) of the CAA.

without reference to the GAOPA, section 509(5) could be interpreted to entitle GAO employees to file a civil action at corresponding points in the administrative process at GAO. However, as discussed above in the context of Title VII, the court in *Ramey v. Bowsher*[1] held that a GAO employee could not file a civil action in district court under Title VII after having received a final PAB decision, and the court stated that the GAOPA forecloses filing a civil action after a GAO employee "invokes the Board's adjudicatory authority in a discrimination case."[2]

Section 509(5) of the ADA makes the remedies and procedures of section 717 of Title VII available for violations of sections 101-104 of the ADA, which establish the basic prohibition of employment discrimination and defenses. The study has identified two areas of inconsistency in coverage. Section 509(5) does not refer to ADA section 503, which prohibits retaliation against employees for exercising ADA rights. The omission of section 503 from the provisions referenced in section 509(5) may prevent a district court from granting a remedy for GAO employees who suffer retaliation for exercising ADA rights.

Second, section 509(5) of the ADA applies to "any employee" of GAO, but does not refer to applicants for employment. The definition of "employee" in the ADA does not include applicants,[3] who are referenced specifically, along with employees, in relevant ADA provisions.[4] It could therefore be argued that applicants for employment at GAO cannot invoke the remedies provided by section 509(5), including the right to file a civil action.

Appellate Review of Agency Administrative Processes

In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[5]

Relief

Section 509(5) applies the remedies and procedures "set forth in" section 717 of Title VII (see discussion above).

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1 *Ramey v. Bowsher*, 9 F.3d 133 (D.C. Cir. 1994).

2 9 F.3d at 136.

3 *See* 42 U.S.C. section 12111(4).

4 *See* 42 U.S.C. section 12112(b).

5 31 U.S.C. 732(f)(1), 753(a)(7), 755.

Regulations

GAO is not covered under EEOC's regulations on federal sector equal employment opportunity. GAO's regulations establishing the GAO personnel management system restate the language in the GAOPA prohibiting discrimination,[1] and also define prohibited personnel practices, based on civil service law, to include discrimination "[o]n the basis of age, as prohibited under sections 12 and 15 of [the ADEA]," committed by a GAO employee with personnel authority.[2]

Procedures

Administrative

The administrative processes at GAO for ADEA violations are generally the same as those for Title VII violations, as described above in the section on Title VII.

Judicial

A GAO employee is entitled under the ADEA section 15(c) to file a civil action in any federal district court of competent jurisdiction. However, employees at federal agencies covered by section 15 of the ADEA are not entitled to a jury trial in an ADEA action.[3] And, as discussed above in the Title VII section, the *Ramey* decision has created some legal uncertainty as to whether GAO employees' have access to federal district courts in discrimination cases.

Appellate Review of Agency Administrative Processes. In a case alleging discrimination made unlawful under the GAOPA including age discrimination cases, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[4]

Relief

In case of a violation of the ADEA, the relief available to a GAO employee is: such legal or equitable relief as will effectuate the purposes of the ADEA.[5]

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1 4 C.F.R. 7.2(a).

2 4 C.F.R. 2.5(a)(2). This corresponds to the prohibited personnel practices defined in civil service law at 5 U.S.C. 2302(b)(1)(B).

3 *See Lehman v. Nakshian*, 453 U.S. 156 (1981).

4 31 U.S.C. 732(f)(1), 753(a)(7), 755.

5 *See* 29 U.S.C. 633a(c).

THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) AND THE REHABILITATION ACT OF 1973

Substantive Rights

Section 509 of the ADA provides that the rights and protections under the entire ADA shall apply to certain congressional instrumentalities, including GAO.[1] Basic provisions with respect to employment discrimination are set forth in title I of the ADA,[2] although additional provisions are found elsewhere in the ADA. In general terms, the law prohibits employment discrimination against "a qualified individual with a disability" because of the disability.[3]

GAO takes the position that section 501 of the Rehabilitation Act, which prohibits discrimination on the basis of handicapping condition for employees in the executive branch, does not apply to GAO, an agency in the legislative branch.[4] However, with respect to the prohibitions against discrimination, the ADA and the Rehabilitation Act each contains cross-references to the other, so that their standards are in most respects substantially the same.[5]

Furthermore, the GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, reiterates those rights, and requires that they be protected by the GAO personnel management system.[6]

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1 42 U.S.C. 12209(1)-(2).

2 42 U.S.C. 12111-12117.

3 42 U.S.C. 12112 (a).

4 29 U.S.C. 791. The PAB has reserved judgment on this issue, because the GAOPA, as enacted, contains references specifically to the Rehabilitation Act. *See* statement of PAB, 58 Fed. Reg. 61988, 61990 (Nov. 23, 1993). These and other references to specific anti-discrimination laws are omitted from the GAOPA language that Congress codified in Title 31, U.S. Code. *See* 31 U.S.C. 732 (historical and revision notes).

5 29 U.S.C. 791(g); 42 U.S.C. 12201(a).

6 The GAOPA requires that personnel actions be taken without regard to "handicapping condition." The term "handicapping condition" is the term that was used in section 501 of the Rehabilitation Act before it was amended to conform to the ADA, which uses the term "individual with a disability."

Regulations

GAO's current regulations establishing the GAO personnel system restate the language in the GAOPA prohibiting discrimination, and also define prohibited personnel practices, based on civil service law, to include discrimination: "[o]n the basis of handicapping condition, as prohibited under section 501 of [the Rehabilitation Act]."[1] On August 28, 1996, GAO published a proposal to amend these regulations by striking references to the Rehabilitation Act and replacing them with references to the ADA.[2] In addition, GAO and the PAB have each issued regulations governing how they will handle ADA complaints, which are described below.

Procedures

Administrative

Section 509 of the ADA states that nothing in that section shall alter "the enforcement procedures for individuals with disabilities" provided in the GAOPA. Under the GAOPA, GAO provides the same administrative processes for ADA complaints as it provides for Title VII complaints (described above in the section on Title VII).

However, the CAA added a new paragraph (5) to section 509 of the ADA, providing that the "remedies and procedures" of section 717 of Title VII shall be available to employees of the congressional instrumentalities covered by section 509 who allege a violation of sections 102 through 104 of the ADA, including a GAO employee, except that the authorities of the EEOC are to be exercised by the head of the instrumentality.[3] Under section 717, the EEOC hears appeals from employing agencies' disposition of discrimination complaints, and has oversight responsibility of employing agencies' EEO programs. GAO management, in its comments, has stated that this provision appears inconsistent with the GAOPA, which provides that the PAB, not the Comptroller General, exercises the EEOC's authority over appeals and oversight matters.

Judicial

Civil Action

As noted above, paragraph (5) of ADA section 509, which was added by the CAA, states that the "remedies and procedures" of section 717 of Title VII shall be available to a GAO employee who alleges a violation of sections 102 through 104 of the ADA. Considered

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[1] 4 C.F.R. 2.5(a)(4). Apparently quoting from the GAOPA as enacted, this GAO regulation also states: "Nothing in this order shall be construed to abolish or diminish any right or remedy granted to employees of or applicants for employment in GAO— . . . (4) by sections 501 and 505 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794a) . . . ."

[2] 61 Fed. Reg. 44187 (Aug. 28, 1996).

[3] 41 U.S.C. 12209(5), as added by section 201(c)(3)(E) of the CAA.

without reference to the GAOPA, section 509(5) could be interpreted to entitle GAO employees to file a civil action at corresponding points in the administrative process at GAO. However, as discussed above in the context of Title VII, the court in *Ramey v. Bowsher*[1] held that a GAO employee could not file a civil action in district court under Title VII after having received a final PAB decision, and the court stated that the GAOPA forecloses filing a civil action after a GAO employee "invokes the Board's adjudicatory authority in a discrimination case."[2]

Section 509(5) of the ADA makes the remedies and procedures of section 717 of Title VII available for violations of sections 101-104 of the ADA, which establish the basic prohibition of employment discrimination and defenses. The study has identified two areas of inconsistency in coverage. Section 509(5) does not refer to ADA section 503, which prohibits retaliation against employees for exercising ADA rights. The omission of section 503 from the provisions referenced in section 509(5) may prevent a district court from granting a remedy for GAO employees who suffer retaliation for exercising ADA rights.

Second, section 509(5) of the ADA applies to "any employee" of GAO, but does not refer to applicants for employment. The definition of "employee" in the ADA does not include applicants,[3] who are referenced specifically, along with employees, in relevant ADA provisions.[4] It could therefore be argued that applicants for employment at GAO cannot invoke the remedies provided by section 509(5), including the right to file a civil action.

Appellate Review of Agency Administrative Processes

In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[5]

Relief

Section 509(5) applies the remedies and procedures "set forth in" section 717 of Title VII (see discussion above).

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1 *Ramey v. Bowsher*, 9 F.3d 133 (D.C. Cir. 1994).

2 9 F.3d at 136.

3 *See* 42 U.S.C. section 12111(4).

4 *See* 42 U.S.C. section 12112(b).

5 31 U.S.C. 732(f)(1), 753(a)(7), 755.

THE EQUAL PAY ACT OF 1963
(EPA)

Substantive Rights

GAO and its employees are covered by the provisions of the EPA, which were enacted as section 6(d) of the Fair Labor Standards Act of 1938 (FLSA).[1] The coverage of the FLSA includes any individual employed by the U.S. Government "in any executive agency (as defined in section 105 of such title [5 of the U.S. Code]," and GAO comes within this statutory definition of an "executive agency."[2]

These same provisions are generally applicable to both federal sector and private sector employees. The EPA prohibits any employer from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex" when they perform substantially equal work under similar working conditions in the same establishment. The FLSA also contains a general prohibition against retaliation, which prohibits discrimination for instituting or testifying in a proceeding under or related to the FLSA (including EPA).[3] Furthermore, the GAOPA, as discussed above, preserves GAO employees' substantive rights under applicable anti-discrimination laws, including the EPA, and also reiterates those rights and requires that they be protected by the GAO personnel management system.[4]

Regulations

GAO's regulations establishing the GAO personnel system restate the language of the GAOPA prohibiting discrimination,[5] and also define prohibited personnel practices, based on civil service law, to include discrimination "[o]n the basis of sex, as prohibited under section 6(d) of [the FLSA]."[6]

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1 29 U.S.C. 206(d).

2 The definition of an "executive agency" in 5 U.S.C. 105 includes: an executive department, a government corporation, and an independent establishment, and 5 U.S.C. 104(2) includes GAO within the definition of "independent establishment."

3 29 U.S.C. 215(a)(3).

4 31 U.S.C. 732(f)(1)(A), (2).

5 4 C.F.R. 7.2(a).

6 4 C.F.R. 2.5(a)(3).

Procedures

Administrative

The administrative processes at GAO for EPA violations are the same as those for Title VII violations, as described above in the section on Title VII.

Judicial

Civil Action. GAO employees are entitled under the EPA to file a civil action in federal district court.[1] The FLSA (of which the EPA is a part) authorizes a civil action in any court of competent jurisdiction. Jury trials are ordinarily not available against the federal government without express statutory authority, and, therefore, are probably not available in EPA cases against GAO or other federal agencies.[2]

Appellate Review of Agency Administrative Processes In a case alleging discrimination made unlawful under the GAOPA, a final decision of the PAB may be reviewed by the U.S. Court of Appeals for the Federal Circuit.[3]

Relief

In case of a violation of the EPA, a GAO employee may recover: any amounts withheld from an employee in violation of EPA requirements; and also an additional equal amount as liquidated damages, except that liquidated damages may be excused if the employer shows that its act or omission was in good faith.[4]

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[1] Section 16(b) of the FLSA authorizes the filing of a civil action. 29 U.S.C. 216(b).

[2] *See Walker v. Thomas*, 678 F. Supp. 164 (E.D. Mich. 1987) (denying a jury trial in an EPA case against a federal employer).

[3] 31 U.S.C. 732(f)(1), 753(a)(7), 755.

[4] *See* 29 U.S.C. 206(d)(3), 216(b), 260.

ALL ANTI-DISCRIMINATION LAWS

EVALUATION

Substantive Rights

The basic prohibitions against discrimination under the anti-discrimination laws (Title VII, ADEA, ADA and EPA) at GAO are generally the same as those afforded other federal sector employees, those in the private sector, and other legislative branch employees covered under the CAA.

The issue of retaliation, however, is somewhat more complicated. In this area, GAO employees like other federal sector employees enjoy broad protections for asserting retaliation claims arising under laws prohibiting discrimination. They can seek administrative remedies under GAOPA. They are also covered specifically under Title VII and EPA and can, therefore, gain access to federal district court in claims of retaliation under Title VII and EPA. But the law is uncertain with respect to ADEA and ADA violations. By comparison, covered legislative branch employees are protected by section 207 of the CAA, which prohibits retaliation for exercise of rights with respect to any law made applicable by the CAA, including the anti-discrimination laws, and private sector employees are protected under specific statutory retaliation provisions in anti-discrimination laws.

Procedures

Administrative

The procedural avenues open to GAO employees are analogous to those in the executive branch, in that the employing agency administers the initial dispute resolution procedures and renders a decision, after which appeal is available to a separate administrative tribunal -- yielding a process that is thorough, but can be duplicative and lengthy. The GAO personnel system also includes enforcement mechanisms for monitoring compliance and detecting violations. The General Counsel of the PAB has authority to take enforcement actions in discrimination cases, including investigation of allegations (with or without a charge having been filed), and seek corrective action or stays and disciplinary action. Although similar investigatory and prosecutorial authorities are available in the executive branch at the EEOC and the Office of Special Counsel and in the private sector at the EEOC, there is no comparable authority under the CAA.

Independence is an important aspect of a comprehensive and effective administrative process in resolving employee complaints. Both the GAOPA and the CAA establish independent avenues for adjudication structured on a model analogous to independent regulatory commissions like the EEOC and the MSPB — boards composed of members with staggered terms, no reappointment, and subject to limited powers of removal. The PAB General Counsel — who is selected by the

Chair and serves at the pleasure of the Chair, albeit formally appointed by the Comptroller General — has statutory responsibility for certain investigatory and prosecutorial functions, and has been assigned by the PAB the additional responsibility of representing claimants in PAB proceedings. Under the CAA, the General Counsel of the Office of Compliance is a statutory appointee selected by the Chair with the approval of the Board, but has no investigatory or prosecutorial authority in EEO cases. The CAA instead establishes a dispute resolution process that provides confidential counseling and mediation and an independent administrative hearing.

The degree of independence of the PAB from GAO management, and the degree of independence and accountability of the PAB General Counsel, were addressed in several comments. One employee organization described widespread dissatisfaction among GAO employees with the performance of the GAO and the PAB in personnel matters, arising largely from a perceived lack of independence of the PAB and its General Counsel. However, another employee organization commented that the PAB does seem to act independently and without bias.

Some commenters expressed concern that the PAB is administratively part of GAO and its Board members and General Counsel are appointed by the head of GAO — the agency that is the subject of PAB's jurisdiction. In contrast, under the CAA, the Board of Directors of the Office of Compliance is established outside of either the House or the Senate or any congressional instrumentality. In enacting the CAA, the Congress was mindful that placing the Board outside of either House of Congress, with jurisdiction spanning both Houses, was essential for the laws to "be enforced in a fair and uniform manner — and employees and the public [to] be convinced that the laws are being enforced in a fair and uniform manner."[1]

An employee organization also commented that the GAO Civil Rights Office and the process for addressing discrimination complaints are compromised and lack credibility. Further, this commenter stated that although mediation services are available, they are provided by agency staff who are responsible for implementing the agency's civil rights and other programs, and are controlled by agency management. According to this commenter, employees are reluctant to use these resources because they are not independent and may not be neutral. Under the CAA, counseling and mediation services are provided to all covered employees who allege discrimination. The mediators are trained neutrals who are not employees of the Office of Compliance and the confidentiality of the process is guaranteed by statute, and is provided for in Office of Compliance procedural regulations. Mediation has only recently been provided on a pilot basis for private sector discrimination claims. Alternative dispute resolution in the form of

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[1] 141 Cong. Rec. S444 col. 1 (daily ed. Jan. 5, 1995). *See also* Report of the Senate Committee on Governmental Affairs to accompany H.R. 4822, S. Rep. No. 103-397, 103d Cong., 2d Sess. 7 (Oct. 3, 1994); testimony of Norman Ornstein (Resident Scholar, American Enterprise Institute) before the Senate Committee on Governmental Affairs, S. Hrg. 103-1047, at 28-29 (June 29, 1994).

mediation is provided in the executive branch EEO process in some agencies.[1]

Section 201(c)(3)(E) of the CAA, while granting employees of GAO (and the other two instrumentalities) administrative and judicial procedures for ADA violations, provides that the authorities of the EEOC will be exercised by the head of the employing instrumentality. GAO has suggested that the law be clarified to assure that this provision does not affect the PAB's authority to decide claims alleging discrimination on the basis of disability.

Judicial

Employees at GAO may file a civil action under anti-discrimination laws at various points after filing an administrative complaint, or as an alternative to filing an administrative complaint in the case of an ADEA or EPA claim. But as discussed above, the *Ramey* decision left some legal uncertainty as to when, and whether, any of the anti-discrimination laws provides any right to GAO employees to file a civil action in federal district court.

Under the CAA, covered legislative branch employees may elect to file a civil action in federal district court after counseling and mediation. Employees in the private sector may obtain a "right to sue notice" from the EEOC.

Under the 1991 amendments to the Civil Rights Act, jury trials are generally available in Title VII and ADA cases. Like other federal sector employees, GAO employees have a right to a jury trial under Title VII and the ADA, but probably not under ADEA and EPA. Jury trials are generally available in EEO cases for private sector employees, as well as for covered legislative branch employees under the CAA.

Judicial Review. Final PAB decisions are subject to appellate judicial review by the U.S. Court of Appeals for the Federal Circuit. Similar appellate review by the Federal Circuit is available for final decisions of the Office of Compliance Board under the CAA.

In the executive branch, by contrast, EEOC decisions may not be appealed to the court of appeals, but the employee retains the right to file a civil action in federal district court even after seeking or receiving EEOC review of the employing agency's decision. Executive branch employees may file a civil action and seek a jury trial *de novo* either after receiving a final decision from the EEOC, or after the appeal to the EEOC has been pending for 180 days without a final decision having been made. One GAO employee organization commented that, as a result of *Ramey*, GAO employees do not have a right that is enjoyed by employees of the executive branch. As the organization explained, if a GAO employee elects to appeal to the PAB, but is not satisfied with the result, the employee has forfeited a right to a jury trial.

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[1] Under the CAA, Capitol Police and Architect of the Capitol employees have the option, if the Executive Director so recommends, of using the grievance procedures administered by each of these employing offices. Section 401 of the CAA, 2 U.S.C. 1401.

Relief

The relief available to GAO employees for EEO violations is generally the same as that available to other legislative branch employees covered under the CAA, as well as for executive branch and private sector employees. However, two kinds of damages are available to private sector employees and covered employees under the CAA, but are not available to GAO or executive branch employees: compensatory damages for discrimination involving race, ancestry, and ethnicity, under 42 U.S.C. 1981; and liquidated damages in the case of a willful violation of the ADEA, in an amount equal to the amount owing as a result of the violation.

In addition, certain punitive damages and penalties are available against private sector employers in Title VII and ADA cases that are not available against federal government employers, including both employing offices under the CAA, and GAO.

Process for Issuing Substantive Regulations

The process for issuing substantive regulations is relatively less important in the EEO area; neither the EEOC nor the Office of Compliance have substantive ruelmaking authority under Title VII; and the Comptroller General's regulations do little more than restate the statutory rights against discrimination.

Timeliness in Resolving EEO Complaints

The PAB regularly reports on timeliness in the GAO internal case handling process. In its 1995 report, [1] the PAB found that, in the 17 discrimination cases in which final agency decisions were issued in FY 1993-1995, it took an average of 581 days from the filing of a formal complaint to the issuance of a final decision. The PAB report concluded this was well below the average for other federal agencies.

The PAB also submitted data indicating that its case processing times compare favorably with those of the EEOC and of the MSPB. For example, the PAB reported that its average case processing time over an approximately 2-1/2 year period through May 1996 was 277 days, compared with an average complaint resolution time at the EEOC of 356 days for FY94.

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[1] GAO Personnel Appeals Board, "GAO's Discrimination Complaint Process and Mediation Program," Chap. 2 (Formal Complaint Process) (September 29, 1995). The PAB determined that, according to the most current EEOC statistics available for 74 executive branch agencies, GAO would fall in the bottom one-third for average case-processing time.

FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

Substantive Rights

While the private sector, state and local governments, and certain federal agencies and employees are covered by FMLA provisions codified in title 29 of the United States Code (FMLA private-sector provisions), most federal agencies and employees, including those at GAO, are covered by the provisions that were added by the FMLA to the civil service law, codified in title 5 of the U.S. Code (FMLA civil service provisions).[1]

The FMLA entitles eligible employees to take up to 12 weeks of unpaid leave in a 12-month period for certain family and medical reasons. The employee may elect to substitute accrued sick leave or annual leave for the unpaid FMLA leave. The employing agency must maintain group health coverage for the employee on leave, and, in most cases, must restore the employee to the same or an equivalent position upon returning from the leave. The FMLA also forbids intimidation, coercion or threats to interfere with an employee's exercise of FMLA rights.

Regulations

OPM has issued regulations implementing the FMLA civil service provisions, applicable to all employees covered by those provisions and their employing agencies, including GAO and its employees.[2]

When the FMLA went into effect in 1993, GAO issued a Personnel Management Memorandum advising all division and office heads of the legislation and of OPM's interim regulations, and directing that employees be notified of their rights and that records be maintained.[3] GAO issued additional Personnel Management Memoranda, GAO Orders, and other documents establishing and describing GAO's general leave policies and procedures and other programs designed to carry out the intent of the FMLA.

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[1] 5 U.S.C. 6381-6387, added by Pub. L. No. 103-3, title II, 107 Stat. 19 (Feb. 5, 1993). Most employees of agencies headed by Presidential appointees are included within the coverage of the FMLA civil service provisions, and the Comptroller General is such a Presidential appointee. *See* 5 U.S.C. 2105(a)(1)(A), (D), 6301(2)(A), 6381(1)(A).

[2] 5 C.F.R. 630.1201-630.1211.

[3] GAO Personnel Management Memorandum No. 2630-5, "The Family and Medical Leave Act of 1993 (FMLA) Posting and Reporting Requirements" (August 3, 1993).

Procedures

Administrative

The FMLA civil service provisions do not provide any administrative or judicial processes by which employees may seek redress for violations. Therefore, employees who believe their rights have been violated must rely on the various remedial provisions available generally for employment-related disputes in the federal government. For example:

- If a GAO employee believes the agency has violated rights and protections under the FMLA, the employee may file a claim under GAO's general administrative grievance procedure.

- If an employee suffers a removal, reduction in pay or grade, or other appealable adverse action, under the GAOPA the employee has a right to appeal to the PAB.[1] Under civil service appeals authority on which the PAB's authority is modeled, the MSPB has ruled that it has jurisdiction over the FMLA as a defense to an otherwise appealable action, and: "If an adverse action is predicated on the agency's erroneous interference with an employee's rights under the FMLA, such adverse action is in violation of law, and it may not be sustained."[2]

- A GAO employee who believes the agency has violated the FMLA could ask the PAB to hear a FMLA complaint alleging that a prohibited personnel practice has occurred.

- A GAO employee who has a claim arising from an FMLA violation could seek redress by applying to OPM under its statutory responsibility to receive and settle federal employees' claims against the government.[3]

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[1] 31 U.S.C. 753(a)(1).

[2] *Ramey v. U.S.P.S.*, 70 M.S.P.R. 463, 467 (May 9, 1996) (citing 5 U.S.C. 7701(c)(2)(C)).

[3] The authority to settle claims against the government has historically been assigned to GAO under 31 U.S.C. 3702. However, the Legislative Branch Appropriations Act, 1996, transferred this claims settlement authority to OMB as of June 30, 1996, subject to delegation. Sec. 211, Pub. L. No.104-53, 109 Stat. 535-536 (1995), set out at 31 U.S.C. 501 note. OMB has delegated the authority to settle employee claims to OPM.

Judicial

A GAO employee who appeals to the PAB may obtain review of the PAB's decision by the court of appeals. In appropriate cases, a GAO employee may also bring suit in the Court of Federal Claims for money owed by the government as a result of an FMLA violation, and may seek restoration to position and correction of records, if warranted, as an incident to a monetary judgment. If the claim does not exceed $10,000, the employee may sue in federal district court.[1]

Relief

Since the FMLA civil service provisions do not specify what relief would be available in case of a violation, an aggrieved employee must rely on other laws or on general legal principles to obtain relief. For example, if an employee is demoted or fired or denied restoration, the employee may claim compensation due under the Back Pay Act.[2] The employee may also seek to recover the amount of benefits guaranteed by the FMLA that are unlawfully denied and are therefore due and owing from the government.

Future-Effective Changes Under the CAA

The CAA amends the FMLA to remove GAO from coverage under the civil service FMLA provisions, and places GAO under the private sector FMLA provisions.[3] The amendment becomes effective one year after this study is transmitted to Congress. Although the basic entitlement — up to 12 weeks of job-protected unpaid leave in a 12-week period — is the same, there are several significant differences in particular substantive provisions.

Under the private sector FMLA provisions, damages may include salary and benefits lost, or actual monetary losses such as the cost of providing care (up to 12 weeks'-worth of salary), plus an equal amount of liquidated damages unless the employer proves that the act or omission was in good faith.[4]

As amended by the CAA, the FMLA private sector provisions state that, in the case of GAO,

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1 28 U.S.C. 1346(a)(2), 1491(a).

2 5 U.S.C. 5596

3 Section 202(c)(1)(A), (2) of the CAA, amending sections 101(4)(A) and 107 of the FMLA, 29 U.S.C. 2611(4)(A), 2617, and 5 U.S.C. 6381(1)(A).

4 29 U.S.C. 2617(a)(1).

the authority of the Secretary of Labor is to be exercised by the Comptroller General.[1] The Labor Secretary's FMLA authority includes the responsibility to promulgate such regulations as are necessary to carry out the provisions, as well as certain enforcement responsibilities.[2] GAO and its employees would thus be removed from coverage by the FMLA regulations promulgated by OPM, which apply generally to employees under the FMLA civil service provisions, and would apparently become subject to regulations that the Comptroller General would promulgate to implement the private sector provisions of the FMLA.

The private sector FMLA provisions authorize employees to bring a civil action for FMLA violation to recover damages and obtain equitable relief.[3] However, jury trials are ordinarily not available against the federal government without express statutory authority,[4] and, since the FMLA provision has no express authority for a jury trial, in a case against GAO under the private sector FMLA provisions, jury trials might not be available.

EVALUATION

Substantive Rights

All of the relevant statutory programs provide the same basic substantive entitlement — up to 12 weeks of job-protected leave in a 12-month period for family and medical purposes. However, there are significant differences in eligibility criteria and substantive rights. Generally, employees are granted greater substantive rights under the civil service FMLA provisions than under the FMLA provisions that apply in the private sector and that are also made applicable by the CAA. Therefore, transferring GAO employees from the coverage of Title 5 to the coverage of Title 29 will reduce their substantive FMLA rights.

Eligibility Criteria. The civil service provisions, the private sector provisions, and the CAA all prescribe different criteria that an employee must meet to be eligible for FMLA leave:

- Under the ***GAO/civil service provisions***, employees become eligible by working at least 12 months at GAO or any other federal civil service agency, except that

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[1] Section 107(f) of the FMLA, 29 U.S.C. 2617(f), as added by section 202(c)(1)(B) of the CAA.

[2] 29 U.S.C section 2654 (Secretary to promulgate regulations); 29 U.S.C. section 2617(b) (Action by the Secretary).

[3] 29 U.S.C. 2617(a)(2).

[4] *See generally Lehman v. Nakshian*, 453 U.S. 156 (1981).

"temporary and intermittent" employees are excluded from coverage.[1]

- Under the ***private sector provisions,*** which the CAA would apply to ***GAO in the future***, employees become eligible by having worked for at least 12 months for an employer, and at least 1,250 hours during the previous 12 months for that employer.[2]

- Under ***the CAA***, employees becomes eligible by working at least 12 months at any employing office covered under the CAA, and for at least 1,250 hours during the previous 12 months for any such employing office.[3]

The "temporary and intermittent" criterion is already widely used in the civil service personnel system for determining eligibility for benefits programs, including annual and sick leave, health benefits, and life insurance benefits.[4]

Of the three eligibility criteria, only the private sector provisions afford no portability. The civil service provisions allow an eligible employee to transfer among federal agencies without losing eligibility, and the CAA allows an eligible employee to transfer among employing offices without losing eligibility. After the private sector provisions go into effect at GAO, an eligible employee who transfers to GAO from any other federal agency or employing office would lose eligibility until after having worked 12 months and 1,250 hours in the previous 12 months for GAO.

Specific FMLA Rights. The specific FMLA rights afforded to eligible employees under the civil service provisions differ in several respects from those accorded under the private sector provisions and the CAA. In each of these instances, the civil service provisions — which apply now to GAO — provide greater FMLA substantive rights than the private sector and CAA provisions. When the FMLA amendments made by the CAA go into effect, and the private sector provisions become applicable to GAO, the substantive rights of GAO employees under FMLA will be diminished:

- ***Employee choice of which kind of leave to take.*** Under the FMLA *private sector and CAA provisions*, the employer may require the employee to take accrued paid leave rather than unpaid FMLA leave, and, if the employee chooses to take paid leave for FMLA purposes, the employer may charge the

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[1] *See* 5 U.S.C. 6381(1)(A).

[2] *See* section 202(a)(2)(B) of the CAA (2 U.S.C. 1312(a)(2)(B)).

[3] *See* section 202(a)(2)(B) of the CAA (2 U.S.C. 1312(a)(2)(B)).

leave against the employee's FMLA entitlement.[1] Under *civil service provisions*, it is entirely the employee's option whether to take accrued paid leave or unpaid FMLA leave, and whether paid leave should be charged against the FMLA entitlement.[2]

- ***Employer recoupment of health insurance contribution.*** Under the FMLA *private sector and CAA provisions*, if the employee fails to return to work for reasons not beyond the employee's control, the amount paid by the employer for health coverage during unpaid FMLA leave may be recovered from the employee.[3] The *civil service provisions* contain no such provision.[4]

- ***Restoration of "key" employees.*** Under the *private sector and CAA provisions*, an employer may deny restoration to certain highly-paid "key" employees, if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office.[5] The *civil service provisions* contain no such provision.[6]

- ***Spouses working for the same employing office.*** Under the *private sector and CAA provisions*, if a husband and wife work for the same employer, their FMLA leave upon birth or placement for adoption or foster care of a child, or to care for a sick parent, may be limited to 12 workweeks in a 12 month period in the aggregate. The *civil service provisions* contain no such provision.

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1 *See* 29 U.S.C. 2612(d)(2), made applicable by section 202(a)(1) of the CAA, 2 U.S.C. 1312(a)(1); 29 C.F.R. 825.208; section 825.208 of the Office of Compliance Board's Family and Medical Leave regulations.

2 *See* 5 U.S.C. 6382(d); 5 C.F.R. 630.1203(h), 630.1205(d).

3 *See* 29 U.S.C. 2614(c)(2), made applicable by section 202(a)(1) of the CAA, 2 U.S.C. 1312(a)(1).

4 *See* 5 U.S.C. 6386; 5 C.F.R. 630.1209.

5 *See* 29 U.S.C. 2614(b), made applicable by section 202(a)(1) of the CAA, 2 U.S.C. 1312(a)(1).

6 *See* 5 U.S.C. 6384(a); 5 C.F.R. 630.1208(a).

Procedures

Administrative

The CAA provides a single administrative process for any FMLA claim, starting with counseling and mediation, and then offering the option of a formal administrative adjudication and appeal. By contrast, civil service law has no single administrative remedy for FMLA claims. Instead, several different administrative routes may be available for an employee seeking redress, depending on the nature of the employee's alleged harm. The PAB offers a measure of independence, but only if the case fits within a category that the PAB has statutory authority to hear, such as certain adverse actions or prohibited personnel practices. GAO's administrative grievance procedure would generally be available for FMLA claims that may not be presented to the PAB, but does not offer a process independent of GAO management. OPM's claims settlement process is available, but only if the claim is for money owed by the Government.

The future-effective CAA provisions would not substantially change this situation, however, because the private sector provisions of the FMLA do not afford administrative remedies. The Comptroller General would assume the statutory authority of the Secretary of Labor to "receive, investigate, and attempt to resolve complaints of [FMLA] violations,"[1] but GAO management already has this authority and responsibility under the administrative grievance procedures.

Judicial

The judicial remedies available under civil service law in case of an FMLA violation are less protective of employee rights than those under the private sector law and the CAA. As is the case with administrative processes, the civil service law does not establish a judicial remedy for FMLA claims, but, depending on the particular circumstances, there may be avenues by which an employee can seek judicial redress for an FMLA violation. For example, an employee who is owed money could seek to collect it by suing in the Court of Federal Claims.

In contrast, employees in the private sector, or legislative branch employees covered under the CAA, may file a civil action in federal district court to seek redress of any FMLA violation, and the right to a jury trial applies under the CAA to the same extent as in the private sector. When private sector provisions go into effect at GAO, employees there would be granted the same access to federal district court, but probably without the right to a jury trial.

Relief

Unlike the civil service FMLA provisions, which do not specify what relief will be available in case of violation, the private sector FMLA provisions specify available relief explicitly. Such relief may include:

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[1] 29 U.S.C. 2617(b)(1).

- Such *equitable relief* as may be appropriate, including employment, reinstatement, and promotion.

- *Salary*, benefits, or other compensation wrongly denied.

- *The cost of providing care*, or any other actual monetary losses sustained as a direct result of the violation, up to a sum equal to 12 weeks of wages or salary for the employee, in a case in which salary and benefits have not been denied or lost.

- *Liquidated damages*, equal to the sum of other damages to which the employee is entitled, including lost salary and benefits or the cost of providing care. (The court may reduce or dispense with the liquidated damages if the employer proves that the violation was in good faith and that the employer had reasonable grounds for believing that the FMLA was not being violated.)

Recovery of the cost of providing care, and an equal amount of liquidated damages, would be an especially important remedy in a situation where an employer has discouraged an employee from taking FMLA leave because the employer does not agree that the employee is entitled. These forms of relief, as specified in the private sector FMLA provisions, are made applicable to other legislative branch employees by the CAA, and would also became available under the future-effective CAA provisions applicable to GAO.[1]

[1] FMLA civil service provisions also make no provision for *attorneys fees*. GAO employees with FMLA-related disputes would have to rely on other available authority, such as EAJA, the Back Pay Act, or PAB regulations, to the extent that they may be applicable to the circumstances of a particular case.

FAIR LABOR STANDARDS ACT OF 1938 (FLSA)

Substantive Rights

Like most federal agencies, GAO and its employees have been covered under the Fair Labor Standards Act of 1938 (FLSA) since enactment of the Fair Labor Standards Amendments of 1974.[1] The FLSA requires payment of the minimum wage and overtime compensation for over 40 hours of work in a workweek to nonexempt employees, and restricts child labor. Employees employed in a bona fide executive, administrative, or professional capacity are exempt from the basic wage and hour standards. Except for employees to whom these or other specific exemptions or exclusions apply, employees are entitled to: *(i)* a minimum wage, currently $4.75 an hour, and *(ii)* overtime compensation for all hours worked over 40 in a workweek at a rate not less than 1-1/2 times the employee's regular rate of pay. Overtime compensation owed to an employee may not be reduced by compensatory time off, except as specifically authorized by statute. The minimum-wage and overtime-pay entitlements at GAO are also governed by implementing regulations promulgated by the Office of Personnel Management (OPM).[2]

Regulations and Civil Service Statutes

GAO and its employees are also covered under the premium pay provisions of the civil service statutes and OPM's regulations, which entitle certain Federal employees to overtime pay for hours of work in excess of 40 in a workweek or 8 in a day.[3] Furthermore, the civil service statutes and OPM regulations on premium pay and on flexible and compressed work schedules,[4] which also apply to GAO and its employees, provide several statutory exceptions

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[1] *See* 29 U.S.C. 203(e)(2)(A)(ii), added by section 6(a) of Pub. L. No. 93-259, 88 Stat. 58 (April 8, 1974). This provisions refers to "any executive agency (as defined in section 105 of such title [5, United States Code]." 5 U.S.C. 105 defines "executive agency" to include an independent establishment, and 5 U.S.C. 104(2) includes GAO within the definition of "independent establishment."

[2] 5 C.F.R. part 551.

[3] 5 U.S.C. 5541-5550a. OPM's FLSA regulations at 5 C.F.R. part 551 specify additional requirements for overtime pay pursuant to the civil service Premium Pay provisions, so that employees who are covered by both the FLSA requirements and the Premium Pay provisions will get the benefit of both entitlements through application of these regulations. *See* 5 C.F.R. 551.401(b), 551.501(a)(4).

[4] 5 U.S.C. 6120-6133.

from the overtime-pay requirements of the FLSA[1]:

- GAO may grant compensatory time off instead of overtime pay for an equal amount of irregular or occasional overtime work to employees upon request (other than a Federal Wage System (FWS)[2] employee).

- "Alternative work schedules" programs allow employees to work over their basic work requirement and accumulate "credit hours" or compensatory time off, or to complete the biweekly work requirement in less than 10 working days, without entitlement to overtime pay.[3]

- GAO employees may elect to work overtime and be granted compensatory time off, instead of overtime pay, for time lost for the employee's religious observances.[4]

GAO Orders

GAO applies the FLSA and applicable OPM regulations through GAO-issued orders:

- GAO's Order on *Compensation for Overtime Work* states that the basic entitlement to overtime pay and compensatory time is governed by applicable statutes and OPM regulations.[5] The Order also establishes supplementary policies regarding accrual and use of compensatory time at GAO, including a "use-it-or-lose-it" rule for compensatory time, under which accrued hours of compensatory time in excess of 10 that GAO does not approve for carryover at the end of a year are lost to the employee, with no entitlement to pay.[6]

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1 OPM's regulations codify the exceptions from overtime-pay requirement that are provided under civil service law. *See* 5 C.F.R. 550.1002(d), 551.209, 551.501(a)(6)-(7), 551.531.

2 FWS employees are, in general terms, "blue collar" employees. FWS covers those employed in a trade or craft, or in a manual labor occupation, or a foreman or supervisor requiring trade, craft, or laboring experience and knowledge, whose pay is set under a prevailing wage system. *See* 5 U.S.C. 5342(a)(2)(A), 5541(2)(xi).

3 *See* 5 U.S.C. 6123, 6128.

4 *See* 5 U.S.C. 5550a.

5 GAO Order No. 2550.1 (April 15, 1994).

6 GAO has explained that this "use-it-or-lose-it" rule is only applied for employees who are exempt from the overtime-pay requirements of the FLSA, and that GAO plans to amend the Order to avoid any misunderstanding. *Cf.* OPM's FLSA regulations at 5 C.F.R.

(continued...)

- GAO's Memorandum on *FLSA Coverage* describes the process by which GAO determines which employees it will treat as exempt and which employees it will treat as non-exempt from FLSA coverage.[1] For most occupational series or other employee categories, the memorandum states that positions in certain grade-levels or band-levels are exempt and positions in other levels are non-exempt.[2]

Procedures

Administrative

OPM's FLSA compliance process and general claims settlement authority. The FLSA provides that OPM administers the Act with respect to most federal employees, including GAO employees.[3] Under this authority, OPM accepts employees' claims of violation, conducts investigations, makes determinations of whether employees are exempt or non-exempt and whether payment is owed to an employee, and issues compliance orders against the employing agency. Furthermore, OPM also has recently been assigned the statutory responsibility to receive and settle monetary claims against the government by federal employees.[4] Under this process, GAO employees may seek redress if they believe they have a claim arising from an FLSA violation.

GAO's administrative grievance procedure. If a GAO employee believes the agency has violated any of the rights and protections under the FLSA, the employee may file a claim

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[6] (...continued)
551.531(d) ("If compensatory time off is not requested or taken within the established time limits [established by the employing agency], the employee must be paid for overtime work at the overtime rate . . . .").

[1] GAO Personnel Management Memorandum No. 2511.1 (Feb. 14, 1990).

[2] GAO has advised that it is now preparing a revised memorandum on this subject. Among other things, the memorandum will emphasize that it is the actual duties and responsibilities being performed by the employee that determine an employee's entitlement to overtime pay under the FLSA.

[3] *See* 29 U.S.C. 204(f); 5 C.F.R. 551.101(a).

[4] The authority to settle claims against the Government has historically been assigned to GAO under 31 U.S.C. 3702. However, the Legislative Branch Appropriations Act, 1996, transferred this claims settlement authority to OMB as of June 30, 1996, subject to delegation. Sec. 211, Pub. L.104-53, 109 Stat. 535-536 (1995), set out at 31 U.S.C. 501 note. OMB has delegated the authority to settle employee claims to OPM.

under GAO's administrative grievance procedure.[1]

Judicial

Under section 216(b) of the FLSA, an action to recover any unpaid compensation owed under the FLSA may be brought in any court of competent jurisdiction.[2] Under the Tucker Act, FLSA actions by federal employees may be brought in the Claims Court or, if the amount claimed does not exceed $10,000, in an appropriate federal district court.[3]

Relief

Under the FLSA, employers, including federal agencies, shall be liable to the employee for unpaid minimum wages or unpaid overtime compensation. The employer shall also be liable for liquidated damages in an amount equal to the amount of unpaid minimum wages or unpaid compensation, except that a court has discretion to reduce or dispense with the award of liquidated damages if the employer shows that the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation. For a violation of the FLSA prohibition against retaliation, legal or equitable relief may be available, including employment, reinstatement, promotion, and the payment of lost wages and an additional amount of liquidated damages.[4] The FLSA also provides that the court shall allow reasonable attorney's fees.[5]

EVALUATION

Substantive Rights

The basic FLSA requirements of minimum wage, overtime compensation, and child labor protections are substantially the same at GAO for working more than 40 hours in a work week as under the CAA. However, there is substantial difference with respect to the availability of compensatory time and other exceptions from overtime pay requirements.

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1 GAO order No. 2771.1 (May 12, 1989), as amended by GAO order No. 2771.1(A.92)(April 12, 1992).

2 29 U.S.C. 216(b).

3 28 U.S.C. 1346(a), 1491. *See Parker v. King*, 935 F.2d 1174,1178 (11th Cir. 1991) (section 1346(a) case); *Brooks v. Weinberger*, 637 F. Supp 22. (D.D.C 1986) (same); *Saraco v. U.S.*, 130 Lab. Cas. (CCH) ¶ 33259 (Fed. Cir. 1995) (section 1491 case).

4 29 U.S.C. 216(b), 260.

5 29 U.S.C. 216(b).

As is generally the case among salaried workers in the federal sector, compensatory time, "credit hours," and compressed schedules outside the FLSA overtime requirements are widely available — but only at the option of employees, and subject to a statutory prohibition of coercion. Compensatory time is less widely available under the CAA, but it can be required under limited circumstances for employees whose schedules depend directly on the schedule of the House or Senate, and it can be provided to Capitol Police law enforcement personnel at their request.[1]

GAO employees are also entitled under civil service law to receive overtime compensation for working more than 8 hours in a day. This entitlement is not made applicable under the CAA.

The FLSA includes a general prohibition against retaliation, forbidding discrimination against employees for filing an FLSA complaint, or testifying in a proceeding under or related to the FLSA.[2] Unlike the retaliation provision in the CAA,[3] which is based on the retaliation provisions in EEO laws, the FLSA does not prohibit retaliation for having "opposed any practice made unlawful."

Procedures

Administrative

A GAO employee may seek to resolve a FLSA dispute administratively, both within GAO's general grievance process, and by application to OPM. These mechanisms do not include structured stages of counseling, mediation, and formal adjudication and appeal that are available under the CAA. OPM may investigate violations and issue corrective orders to federal agencies.[4] No such investigative authority is established under the CAA.

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1 *See* sections 203(c)(3), (4) of the CAA, 2 U.S.C. 1313(c)(3), (4). Subsection (c)(4), regarding the Capitol Police, was added by section 312 of Pub. L. No. 104-197, 110 Stat. 2415 (Sept. 16, 1996).

2 29 U.S.C. 215(a)(3), 216(b).

3 Section 207 of the CAA, 2 U.S.C. 1317.

4 5 C.F.R. 551.104; Federal Personnel Manual (FPM) letter No. 551.9 (March 30, 1996), which, according to OPM, continues to accurately describe OPM practices in spite of the elimination of the FPM system.

Judicial

Employees may file a civil action under the FLSA regardless of whether the employee pursued any administrative complaint processing. Under the CAA, a covered employee may file a civil action after counseling and mediation, plus an additional waiting period of 30 days. Thus, an employee who wishes to file a civil action without first filing an administrative complaint may do so under the FLSA as it applies at GAO, but not under the CAA.

Since the constitutional right to a jury trial is available in appropriate FLSA cases in the private sector, the right to a jury trial is available to the same extent in FLSA cases under the CAA. However, jury trials are ordinarily not available against the federal government without express statutory authority,[1] and, therefore, are probably not available in FLSA cases in the federal sector or against GAO or other federal agencies.

Relief

The unpaid minimum wages, unpaid overtime compensation, additional liquidated damages, and legal or equitable relief for retaliation, as provided in the FLSA, are available for a violation at GAO, elsewhere in the federal sector, in the private sector, and under the CAA.

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[1] *See, generally, Lehman v. Nakshian*, 453 U.S. 156 (1981).

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

Substantive Rights

The Occupational Safety and Health Act protects the safety and health of employees in their places of employment. GAO is currently covered by section 19 of OSHA, which requires the head of each federal agency to establish and maintain a comprehensive occupational safety and health program, consistent with the standards promulgated by the Secretary.[1] This provision also requires agency heads to submit annual reports to the Secretary of Labor on occupational accidents and injuries, and on the status of the agency's safety and health program.[2]

The related provisions of 5 U.S.C. 7902, establishing safety programs, cover an agency "in any branch of the Government of the United States,"[3] and therefore cover GAO. They are similar in their requirements to those of 29 U.S.C. 668, which also address safety and health programs of federal agencies. Executive Order 12196, which was promulgated under 5 U.S.C. 7905, and which sets forth specific duties for heads of federal agencies in establishing health and safety programs and requires executive branch agencies to comply with the provisions of 29 C.F.R. part 1960, however, covers only executive branch agencies.[4] Although GAO is not bound by the Executive Order, the agency does subscribe to its intent and has adopted comparable safety and health standards.[5]

Regulations

OSHA regulations issued by the Secretary are not binding on the legislative branch unless by agreement by the head of the agency.[6] GAO does not have such an agreement with the Secretary,

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1 *See* 29 U.S.C. 668(a). "It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 655 of this title."

2 29 U.S.C. 668(a)(5).

3 5 U.S.C. 7902(a)(2).

4 *See* Executive Order 12196, February 26, 1980, as amended by Executive Order 12223, June 30, 1980, and Executive Order 12608, September 9, 1987, section 1-102.

5 *See* GAO Order 2792.4, Ch. 1 sec. 4(c) (February 8, 1996).

6 *See* 29 C.F.R. 1960.2(b). ("By agreement between the Secretary of Labor and the head of an agency of the Legislative or Judicial branches of the Government, these regulations may be applicable to such agencies.")

and has therefore issued its own health and safety regulations.[1]

GAO Order. Although the agency is not compelled to comply with the OSHA regulations issued by the Secretary, GAO has adopted portions of the relevant health and safety codes and standards, thereby making them applicable to the agency.[2] Through the adoption of these codes and standards, GAO has developed a health and safety compliance program that includes periodic inspections of GAO facilities and equipment, monitoring procedures, counsel and assistance concerning health and safety to GAO employees, and evaluation and correction of health and safety issues.

Procedures

Administrative

GAO employees who have complaints related to safety and health submit those complaints (preferably in writing) to the Unit or Site Health and Safety Representative, who will either resolve the complaint or solicit the assistance of General Service and Controller/Office of Real Property Services (GS&C/ORPS), as necessary. Upon request, complaints will remain anonymous. If the employee who filed the complaint has not received adequate resolution within 30 days, he/she contacts the Director, Office of Security and Safety (GS&C/OSS).[3] There is apparently no further review available to employees. Because the Occupational Safety and Health Administration does not have enforcement authority over GAO, the administrative review process is self-enclosed internal process, and GAO employees may not go outside of the agency for further review of safety and health issues.

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1 *See* GAO Order 2792.4.

2 *See* GAO Order 2792.4, Ch. 1 sec. 7(b). GAO has adopted applicable portions of the following codes and standards: 29 C.F.R. parts 1910, 1915-1919, 1926, and 1960; 40 C.F.R. part 763, sub-part E; 41 C.F.R. subtitle C, Chapter 101; PBS-P-3430.1A, Facilities Standards for Public Buildings Service, U.S. General Services Administration (GSA); PBS-P-5900, Safety and Environmental Management Program, GSA; National Fire Protection Association Codes and Standards; Building Officials and Code Administrators International Inc., Basic Building and Fire Codes; Americans with Disabilities Act Guidelines; American National Standards Institute/American Society of Mechanical Engineers A17.1, Safety Code for Elevators and Escalators; American Conference of Governmental Industrial Hygienists, Threshold Limit Values and Biological Exposure Indices; Occupational Safety and Health Administration (OSHA) Standards; EM 385-1-1, Safety and Health Requirements Manual, U.S. Army Corps of Engineers.

3 *See* GAO Order 2792.4 at Ch. 3 sec. 3.

GAO currently maintains an accident reporting and investigation program.[1] Each Health and Safety Representative must maintain an Accident Reporting Log for the site by fiscal year.[2] Throughout the year all accidents, fires, and other emergencies, with or without injuries, should be thoroughly investigated by the Health and Safety Representative for the affected site.[3] A copy of the resulting report must be submitted to the Health and Safety Staff, through unit management, no later than 30 days after the incident was reported.[4]

Judicial

Under current law no judicial remedies are available to GAO employees to redress safety and health issues.

Future-Effective Changes Under the CAA

Pursuant to the CAA, one year after this Section 230 Study is transmitted to Congress, the provisions of section 215 implementing OSHA become applicable to GAO.[5]

Section 215(a) of the CAA requires each employing office and each covered employee to comply with the provisions of section 5 of OSHA. Section 5(a) of OSHA provides that every covered employing office has a general duty to furnish each employee with employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to those employees, and a specific duty to comply with occupational safety and health standards promulgated under the law.[6] Section 5(b) requires covered employees to comply with occupational safety and health standards, and with all rules, regulations, and orders issued pursuant to OSHA that are applicable to their actions and conduct.[7]

Under section 215(c) of the CAA, any employing office or covered employee may request the General Counsel to inspect and investigate places of employment under the jurisdiction of the employing offices. A citation or notice may be issued by the General Counsel to any employing

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1 *Id.*

2 *See* GAO Order 2792.4, Ch.3.

3 *See id.*

4 *See id.*

5 2 U.S.C. 1341(g)(2).

6 29 U.S.C. 654(a).

7 29 U.S.C. 654(b).

office that is responsible for correcting a violation of OSHA, or that has failed to correct a violation within the period permitted for correction.[1] The citation is issued only against the employing office that is responsible for the particular violation, as determined by the regulations issued by the Board. If the violation is not corrected, the General Counsel may file a complaint against the employing office with the Office of Compliance. The complaint is then submitted to a hearing officer for decision, with subsequent review by the Board.

Section 215(e) requires that the General Counsel on a regular basis, and at least once each Congress, conduct periodic inspections of all covered facilities and report to Congress on compliance with health and safety standards.[2]

Section 215(d) of the CAA requires the Board of Directors of the Office of Compliance to issue regulations that are "the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights under this section."[3]

Section 11(c) of OSHA, prohibiting discharge or discrimination against an employee for exercise of the employee's rights, is not one of the provisions of OSHA that was incorporated into the CAA by section 215. However, a GAO employee who believes that the agency has retaliated for exercising employee rights regarding OSHA might claim that this is a prohibited personnel practice under administrative procedures established by the GAOPA. Furthermore, after GAO and its employees become subject to the provisions in section 215 of the CAA, GAO and its employees will also become subject to the provisions of the CAA forbidding retaliation and establishing administrative and judicial dispute-resolution procedures.[4] Assuming that these provisions do become applicable, a GAO employee alleging retaliation would be able to file an administrative complaint with the Office of Compliance or a civil action in district court.

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[1] 2 U.S.C. 1341(c).

[2] 2 U.S.C. 1341(e).

[3] 2 U.S.C. 1341(d).

[4] Sections 207 and 401-416 of the CAA, 2 U.S.C. 1317, 1401-1416.

EVALUATION

Substantive Rights

In making certain provisions of OSHA applicable to GAO, the CAA will impose additional obligations on the agency. Under the CAA, GAO will be required to adhere to the safety and health regulations issued by the Board under section 215(d), whereas GAO's compliance with safety and health standards under OSHA is not now subject to enforcement by any entity outside of GAO.[1] However, in satisfying its requirement to issue regulations, the Board has determined that all regulations promulgated by the Secretary to implement section 5 of OSHA are "substantive regulations" within the meaning of section 215(d).[2] The Board has therefore proposed to adopt all otherwise applicable substantive health and safety standards of the Secretary's regulations published at 29 C.F.R. parts 1910 and 1926, with only limited modifications.[3] GAO already purports to comply with applicable federal laws and regulations, including the health and safety standards published at 29 C.F.R. parts 1910 and 1926.[4] Therefore, despite the fact that GAO's compliance with safety and health standards under the CAA will be subject to enforcement by an outside entity, the promulgation of external safety and health regulations under the CAA may not have the practical effect of changing the working environment of GAO employees.

Retaliation

The CAA will, however, provide GAO employees with a right to bring a civil action for intimidation, discrimination or reprisal actions taken by an employing office because the employee has opposed a practice made unlawful by the CAA, or because the employee has initiated proceedings, made a charge, or testified, assisted, or participated in a hearing or proceeding under the CAA.[5] Section 11(c) of OSHA, prohibiting discharge or discrimination against an employee for exercise of the employee's rights, is not one of the provisions of OSHA that was incorporated into the CAA in section 215. However, the general anti-retaliation provision in section 207 of the CAA prohibits retaliation against a covered employee for exercising rights under the CAA,

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1 141 Cong. Rec. S11020 (daily ed. Sept. 19, 1996).

2 *See*, e.g., 142 Cong. Rec. S11019, S11020 (daily ed. September 19, 1996) (Notice of Proposed Rule Making implementing section 215 of the CAA).

3 *See id*.

4 *See* GAO Order 27924.4, Ch.1 sec. 7(b).

5 2 U.S.C. 1317.

including the rights and protections of section 215.[1]

Administrative

Under present law, GAO has an internal investigation and administrative grievance process to address employee safety and health complaints.[2] Under the CAA, however, the General Counsel of the Office of Compliance will exercise the authority to investigate and inspect places of employment, as well as issue citations and prosecute violations that are not corrected by the employing office named in the citation or notification.[3]

The CAA grants the General Counsel the authority under subsections (a), (d), (e), and (f) of section 8 of OSHA to inspect places of employment under the jurisdiction of employing offices, upon written request of any employing office or covered employee.[4] Section 8 of OSHA establishes the authority of the Secretary of Labor to conduct inspections of work sites in the private sector.[5] Section 215 of the CAA, however, sets forth the inspection authority of the General Counsel in different terms than section 8 of OSHA. Subject to the constraints of the fourth amendment,[6] section 8 of OSHA grants the Secretary a broad power to enter and inspect private sector workplaces,[7] whereas section 215 of the CAA states that the General Counsel may inspect places of employment "[u]pon written request of any employing office or covered employee."[8] The General Counsel shall also, however, inspect all covered facilities "on a regular basis, and at least once each Congress" to determine compliance with the substantive protections granted in section 215(a) of the CAA.[9]

In addition, section 215(c)(2) of the CAA gives the General Counsel the authority to issue

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1 *Id.*

2 *See* discussion of "Administrative Processes" at section 1 *supra.*

3 2 U.S.C. 1341(c).

4 2 U.S.C. 1341(c)(1).

5 29 U.S.C. 657.

6 No search warrant is expressly required under the Act. However, since the Supreme Court's decision in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), OSHA has been required to perform consensual worksite inspections pursuant to an administrative search warrant. *See* BOKAT AND THOMPSON, OCCUPATIONAL SAFETY AND HEALTH LAW 214 (BNA Books 1988).

7 Section 8(a) of OSHA, 29 U.S.C. 657(a).

8 2 U.S.C. 1341(c).

9 Section 215 (e)(1) of the CAA, 2 U.S.C. 1341 (e)(1)

citations for violations of OSHA in the same manner as the Secretary of Labor under sections 9 and 10 of OSHA.[1] Under section 10 an employer has fifteen working days from the issuance of a citation to notify the Secretary that he/she wishes to contest the citation.[2] That right is not provided to employing offices under section 215 the CAA.

Record Keeping and Report Obligations

Section 668(a)(5) of title 29 requires agency heads, including the head of GAO, to submit annual reports to the Secretary on occupational accidents and injuries and on the agency programs established under section 668. Section 7902(e) of title 5 imposes similar record keeping and report requirements on each agency. However, there is no apparent mechanism for enforcement of these sections against federal agencies.

Section 215 of the CAA, and the proposed requirements thereunder, do not require employing offices to comply with these general safety and health record keeping requirements.[3] However, certain record keeping requirements that are part of the substantive safety and health standards under 29 C.F.R. parts 1910 and 1926, such as employee exposure records, are required.[4] The Board has not addressed whether section 215 of the CAA, and the regulations the Board proposes to implement thereunder can be harmonized with the preexisting statutory requirements otherwise applicable to GAO, but not within the scope of the CAA, that might independently apply to GAO.[5]

Judicial

Under present law, no judicial remedies are available to GAO employees, nor would the CAA provide GAO employees with a judicial remedy. However, the General Counsel or an employing office aggrieved by a final decision of the Board following a hearing or variance proceeding, may file a petition for review with the United States Court of Appeals for the Federal Circuit pursuant

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1 29 U.S.C. 658, 659.

2 29 U.S.C. 659(a).

3 *See* Notice of Proposed Rule Making Implementing section 215 of the CAA, 142 Cong. Rec. S11021.

4 *See id.*

5 *See* 142 Cong. Rec. S11021, 11022 (citing Notice of Adoption of Regulations and Submission for Approval and Issuance of Interim Regulations under section 203 of the CAA), 142 Cong. Rec. S224 (daily ed. Jan. 22, 1996) (declining to address issue of harmonizing regulations regarding overtime exemption for law enforcement officers under section 203 with preexisting statutory overtime exemption for Capitol Police under 40 U.S.C. 206b-206c).

to section 407 of the CAA.[1]

Office of Compliance Inspection

The General Counsel of the Office of Compliance conducted inspections of the main headquarters building of GAO on February 27 and 29, 1996. Based upon the inspection tours the General Counsel made the following finding: "The GAO has an active and effective safety and health program staffed with knowledgeable personnel. The few deficiencies noted were generally minor in nature and corrective actions were initiated almost immediately."[2]

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[1] 2 U.S.C. 1341(c)(5).

[2] *See* "Report on Initial Inspections of Facilities for Compliance with Occupational Safety and Health Standards Under Section 215," June 28, 1996, at III-54 (Office of Compliance publication).

LABOR-MANAGEMENT RELATIONS
(Chapter 71, Title 5, U.S.C.)

Substantive Rights

Under the GAOPA, as part of its personnel management system, the Comptroller General is authorized to adopt procedures that ensure the right of employees either to form, join, or assist an employee organization, or to refrain from such activity, and to adopt a labor-management relations program that is "consistent" with the Federal Service Labor-Management Relations Statute, chapter 71 of title 5 U.S.C. (Chapter 71).[1]

Regulations

GAO order 2711.1 and the GAO Operations Manual set forth detailed provisions of its labor-management relations program, which are modeled after the provisions of Chapter 71. The General Accounting Office Personnel Appeals Board (PAB) promulgated regulations establishing its special procedures rules for conducting representation proceedings, and for the consideration of unfair labor practices.[2]

Procedures

Administrative

The PAB is vested with authority to consider cases arising from representation matters and from other matters that are "appealable to the Board under the labor-management relations program" of the Comptroller General, including unfair labor practices.[3] The PAB's powers and duties include:

- determining appropriate units for labor organization representation;
- supervising or conducting elections to determine whether a labor organization has been selected as exclusive representative;

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[1] 31 U.S.C. 732(e). Chapter 71 generally ensures that federal employees in the executive branch have the right to choose freely and without reprisal whether to organize and to be represented by an exclusive representative for purposes of bargaining over terms and conditions of employment. The Federal Labor Relations Authority (FLRA) is the independent agency responsible for enforcing Chapter 71. Chapter 71 expressly excludes GAO from coverage.

[2] 4 C.F.R. 28.110-28.124. Given the exclusion of the GAO from the provisions of Chapter 71, the implementing regulations promulgated by the FLRA do not apply.

[3] 31 U.S.C. 753(a)(4)-(6).

- C certifying labor organizations as exclusive representative;
- C resolving certain issues regarding the duty to bargain in good faith;
- C conducting hearings and resolving complaints of unfair labor practices and standards of conduct for labor organizations;
- C resolving exceptions to arbitrators' awards; and
- C "tak[ing] such other actions as are necessary and appropriate to effectively administer the provisions of [GAO Order 2711.1]."

Resolution of Negotiating Impasses. GAO Order 2711.1 provides for the establishment of a seven-member "ad hoc joint management-union committee," to be chaired by the PAB Chair or the Chair's designee, to assist in resolving impasses. If the committee determines that the process of collective bargaining has been exhausted, the chair conducts binding arbitration of the dispute.

Grievance Procedures and Arbitration. GAO Order 2711.1 provides that any collective bargaining agreement shall provide procedures for settlement of grievances, and that grievances not satisfactorily settled shall be subject to binding arbitration.

Judicial

Judicial review to the Court of Appeals for the Federal Circuit is available for decisions made under the PAB's authority to hear cases arising from "a matter appealable to the Board under the labor-management relations program under section 732(e)(2) of this title, including a labor practice prohibited [under the GAOPA]."[1] Under this scheme, direct judicial review of representation issues, such as the appropriateness of the bargaining unit and conduct of the election, is not immediately available.

EVALUATION

Substantive Rights

In so far as the CAA applies the rights, protections, and responsibilities of chapter 71 to employing offices of the legislative branch, a comparison of GAO's current labor-management relations law with what would be available under the CAA yields some noteworthy differences:

- C Definition of "employee". In order to be a covered "employee" under GAO Order 2711.l,

[1] 31 U.S.C. 753(a)(6), 755.

an individual must hold either a full-time or a part-time appointment that confers competitive status under 31 U.S.C. §732(g).[1] In contrast, under the CAA, the definition of covered employee contains no such qualification. With respect to exclusions, there is likewise a difference. Under GAO Order 2711.l, an individual "appointed as a temporary or intermittent expert or consultant" is expressly excluded.[2] There is no comparable provision under the CAA.

C Definition of "professional employee". While the GAO Order incorporates the definition of "professional employee" that is found in chapter 71, and is applied by the CAA, the order also adds as an alternative definition an "employee engaged in the performance of audit or evaluator work."[3] The CAA contains no corresponding alternative definition. Thus, under the CAA, the fact that an employee is engaged in the performance of audit and evaluator work by itself would not suffice to classify the individual as a "professional employee."

C Definition of "conditions of employment". For purposes of negotiating conditions of employment, the GAO Order excludes as a bargaining subject any matter "relating to the pay and number of work hours of GAO employees."[4] The CAA contains no explicit exclusion for matters relating to pay or number of work hours. To the extent that any such matters would be excluded as bargaining subjects, they would have to satisfy the exclusion for matters that are specifically provided for by federal statute.

C Definition of "grievance" and grievance procedures. For purposes of resolving grievances under the GAO Order, the definition of "grievance" is limited to "any complaint concerning the interpretation or application of a collective bargaining agreement."[5] In addition, the GAO Order expressly excludes from a negotiated grievance procedure that is established under a collective bargaining agreement certain subjects, including discrimination claims based on race, color, religion, age, sex, national origin, political affiliation, marital status, or disability.[6] Also, the negotiated grievance procedure may not be used when grievances over reductions in grade and removals because of unacceptable

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1 Section 4.d.(1)(a) & (b).

2 Section 4.d.(2)(b).

3 Section 4.h.(1).

4 Section 4.n.(3).

5 Section 4.o.

6 Section 17.d.

performance are involved.[1] In contrast, as applied under the CAA, by definition, "grievance" includes: any complaint by any employee or labor organization concerning any matter relating to the employment of any employee; or any complaint by any labor organization or employing agency concerning the effect, interpretation, or alleged breach of a collective bargaining agreement, or concerning any alleged violation, misinterpretation, or misapplication of any law, rule, or regulation affecting employment conditions.

C Minimum voting threshold for obtaining exclusive recognition. Under the GAO Order, the GAO will accord exclusive recognition to a labor organization that receives the vote of a majority of unit employees voting in a secret ballot election, with the proviso that the labor organization must receive the votes of at least 30 percent of employees in the unit.[2] There is no such 30 percent minimum under the CAA.

C Scope of appropriate bargaining units. In addition to setting forth a general standard for determining appropriate bargaining units, drawn from Chapter 71, the GAO Order declares in three instances what is the appropriate unit scope: (1) for regional offices and suboffices, the appropriate unit consists of a nationwide unit of all professional or nonprofessional employees; (2) for headquarters, the appropriate unit consists of a headquarters-wide unit of all professional, nonprofessional, or craft employees (including all audit sites in the Washington, D.C. area); and (3) for overseas offices, the appropriate unit consists of a unit which includes all professional or nonprofessional employees.[3] The CAA and regulations adopted by the Board (based on regulations of the FLRA for the executive branch) do not include comparable provisions that predetermine the appropriate unit scope for such offices.

C Consultation rights. The GAO Order contains no provision for affording an exclusive representative either national consultation rights with respect to substantive changes in conditions of employment, or government-wide rule or regulation consultation rights with respect to rules or regulations that substantively change conditions of employment.[4] Under the CAA, such rights would be afforded to exclusive representatives.

C Procedure for authorizing dues allotments to representatives. The GAO Order does not incorporate from chapter 71, the procedure by which a labor organization with a 10 percent showing of interest may petition for authorization to negotiate with an employing

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[1] Section 17.e.

[2] Section 8.a.

[3] Section 9.a.(1), (2), (3).

[4] *Compare* 5 U.S.C. 7113, 7117.

agency over a dues deduction procedure covering members in the labor organization.[1] The CAA, in applying the rights and protections of chapter 71, would provide for such a procedure.

The CAA applies provisions of Chapter 71, rather than the provisions of the National Labor Relations Act (NLRA),[2] which is applicable to private employers, and is administered by the National Labor Relations Board. There are fundamental differences between Chapter 71 and the NLRA, most notably in the areas of union recognition, the right to strike and the use of other economic weapons, the availability of union security, and the manner in which negotiations over terms and conditions of employment are conducted and impasses are resolved. In the federal sector, recognition of a union as exclusive representative may be effectuated only after a representation election; strikes are proscribed; a labor organization may not enter into a union security agreement with an employing agency; an employing agency in certain instances may be required to submit to impasse procedures that can result in the imposition of employment terms. In the private sector, as an alternative to a representation election, an employer is permitted to voluntarily recognize a union upon a showing of majority support; employees have, with limitations, the right to strike and to use other economic weapons; a union, with limitations, may negotiate a union security agreement with an employer; and, an employer after impasse cannot be ordered to agree to employment terms.

Procedures

Administrative

The PAB, an internal office of the GAO, administers the labor management relations program. The PAB decides legal issues in connection with representation matters and in unfair labor practices. The PAB General Counsel has certain responsibilities in investigating representation matters and prosecuting unfair labor practice cases before an agency hearing officer and before the PAB. In certain cases, however, before an employee can file an unfair labor practice charge with the General Counsel, the employee must seek an informal resolution of the matter with the charged party. Where the PAB General Counsel does not believe that the charge is reasonably well-founded, the charging party may nevertheless pursue the claim individually.

Under the CAA, the Board of Directors exercises the authority to conduct representation cases and to decide unfair labor practice cases. Legal questions on such matters as the appropriateness of the bargaining unit, exclusions, and whether representation elections were conducted free of objectionable conduct, are decided by the Board. The General Counsel of the Office of Compliance exercises the authority to investigate and prosecute unfair labor practice allegations before a hearing officer, who issues a written decision within 90 days determining whether the

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[1] *Compare* section 11 with 5 U.S.C. 7115(c).

[2] 29 U.S.C. 151 et seq.

allegations have merit and if so, what remedies are appropriate. Hearing officer decisions may be appealed to the Board of Directors. Unlike the GAO scheme, if the General Counsel determines that an unfair labor practice charge is not meritorious, the General Counsel dismisses the charge, for which there is no right of review; the charging party may not pursue his or her claim individually.

Many similarities exist between the administrative processes for handling labor-management relations matters under the GAOPA and those under the CAA, both being patterned after the processes established under chapter 71 of title 5, U.S.C. Coverage under the CAA, however, would afford GAO employees the ability to pursue their rights with an enforcement office whose adjudicatory body and prosecuting officer are completely separate and independent of the employing office. Under the CAA, a GAO employee would not have the right individually to pursue an unfair labor practice claim that the Office of Compliance's General Counsel has found nonmeritorious.

Judicial

With the one significant exception, the rights of judicial review under the GAO and the CAA schemes are similar. The GAOPA provides that any person, including employees aggrieved by a final decision of the PAB, may seek judicial review in the Court of Appeals for the Federal Circuit. Under the CAA, only the General Counsel or a respondent to an unfair labor practice complaint, if aggrieved by a final decision of the Board of Directors, may file a petition for judicial review in the U. S. Court of Appeals for the Federal Circuit. Thus, were GAO employees covered under the CAA, their right of judicial review would be more circumscribed. For example, the Board may dismiss a claim prosecuted by the General Counsel, based on a charge filed by an employee, if the General Counsel elects not to seek review in the court of appeals. In such a case, the charging party would have no standing to appeal the matter.

Process for Issuing Substantive Regulations

GAOPA authorizes the Comptroller General, who is the head of the employing office, to establish substantive rights and protections regarding labor-management relations. The CAA provides that substantive regulations implementing the labor-management provisions be adopted by the independent Office of Compliance Board of Directors (Board), subject to approval or disapproval by the House and Senate.

Furthermore, the statutory standard governing the rulemaking by the Comptroller General is that the labor-management relations program for GAO be "consistent" with Chapter 71. By comparison, the CAA makes the rights, protections, and responsibilities established under specified sections of Chapter 71 applicable, and the Board is directed to issue implementing regulations that must be "the same as" FLRA regulations, except to the extent the Board determines that a modification is required by virtue of specified statutory criteria (involving more effective implementation of rights and protections, a conflict of interest, or Congress' constitutional responsibilities).

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

Substantive Rights

The Worker Adjustment and Retraining Notification Act (WARN), which assures employees in the private sector of notice in advance of office or plant closings or mass layoffs, does not apply to GAO. However, effective one year after this study is transmitted to Congress, the CAA provisions that apply WARN rights and protections to congressional offices and employees will be extended to cover GAO and its employees as well.

Until recently, GAO was subject to the provisions of generally applicable civil service law and OPM regulations regarding "Retention Preference," which requires that 60 days' advance notice be given to employees affected by a RIF.[1] However, in November 1995, as part of the FY96 Legislative Branch Appropriations Act, Congress added a new section to the GAOPA directing the Comptroller General to "prescribe regulations . . . [for RIFs] which give due effect to tenure of employment, military preference, performance and/or contributions to the agency's goals and objectives, and length of service," but notwithstanding the generally applicable civil service requirements regarding Retention Preference.[2] The new legislation does not include a guarantee that GAO employees be granted notice in advance of a RIF, although GAO-issued Order 2351.1, on Reduction in Force, which implements the 1995 legislation (RIF Order), establishes standards and procedures for conducting a RIF at GAO, including a requirement to notify affected employees similar in most respects to the notice requirement under civil service law and regulations that had previously applied to GAO.

Procedures

Administrative

The various administrative complaint processes established under the GAOPA are available in a case where a GAO employee is affected by a RIF, including where notice requirements were not met. Thus, any employee who has been furloughed for more than 30 days, separated, or demoted may file an appeal with the PAB. GAO management has explained that, if notice has been defective, the PAB can order back pay and direct that the employee be reinstated until the notice defect is corrected.

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[1] 5 C.F.R. 351.801 - 351.807

[2] 31 U.S.C. 732(h), as added by section 213 of Pub. L. No. 104-53, 109 Stat. 536 (Nov. 19, 1995).

Judicial

The GAOPA does not provide the right to file a civil action in case of violation of the rights under the RIF Order. Final decisions of the PAB are appealable to the U.S. Court of Appeals for the Federal Circuit.

Future-Effective Changes Under the CAA

When the WARN Act provisions of the CAA go into effect at GAO, one year after this study is transmitted to Congress, a GAO employee who claims a violation of these provisions under the CAA may elect to file a civil action, request a jury trial, and receive the remedies afforded under the WARN Act provisions of the CAA, which are back pay and benefits for each day of violation, up to 60 days. If the GAO employee elects to have an adjudicatory hearing under the CAA, and if the case is decided on appeal by the Office of Compliance Board, the CAA provides the right of judicial review in the U.S. Court of Appeals for the Federal Circuit.

EVALUATION

Substantive Rights

Unlike the GAOPA, which requires certain protections regarding RIFs, but does not specify that advance notice be among the protections, the CAA affords a statutory guarantee of advance notice in the case of an office or plant closing or mass layoff. However, the Comptroller General has provided for advance notice in the GAO RIF Order, and, in most respects, the GAO Order provides employees substantive rights to notice that are as extensive as, or more extensive than, the rights afforded under WARN provisions made applicable by the CAA:

- The CAA guarantees notice only in the case of an "office closing" or "mass layoff."[1] As defined in applicable statutes and regulations, these terms involve an employment loss during a 30-day period to a significant number of employees at an employment site.[2] Under the GAO RIF Order, there is no minimum number of employees who must be affected to trigger notice requirements. If a single employee is separated, demoted, reassigned, or furloughed for more than 30 days, and if the cause is a lack of work, a shortage of funds, reorganization, or certain similar reasons, the action is a

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[1] *See* section 205(a)(1) of the CAA, 2 U.S.C. 1315(a)(1); regulations of the Board implementing section 205.

[2] 29 U.S.C. 2102; 20 C.F.R. 639 et. seq.

RIF, and notice must be given.[1]

- Both the CAA and the GAO RIF Order ordinarily require 60 days' advance notice. Both also provide for a shortened notice period in the case of unforeseeable circumstances, but the GAO Order, unlike the CAA, establishes a minimum notice period of 30 days under any circumstances.[2]

In at least one respect, however, the substantive notice requirements in the CAA provide greater employee protection. In the case of an office closing or mass layoff, when not all employees are to be laid off on the same date, the CAA requires that notice regarding all affected employees be given 60 days before the date on which the first individual is laid off.[3] The GAO Order contains no such provision.

GAO management has recommended that WARN should not be made applicable to GAO, because GAO's RIF Order provides employees more extensive rights than WARN. The comment explained that the 60-day notice requirement in the Order is only one of many procedures designed to protect GAO employees who could be affected by a RIF, and that, even as to the limited issue of the notice requirement, which is the only protection offered by WARN, GAO's RIF Order provides employees more extensive rights than are available under WARN.

Moreover, the notice requirement is only one component of an "integrated system," which also guarantees that seniority, performance, and veterans' preference will be taken into account in any RIF decisions, and also provides that employees will be permitted to inspect relevant records on which a RIF decision will be based. An employee advisory council commented that the GAO RIF Order provides less protection to employees than the civil service law and regulations that formerly applied at GAO. However, except for the notice requirements of WARN Act, the CAA does not govern conduct of a RIF at all.

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[1] GAO Order 2351.1, Chap. 1(6) (February 28, 1996).

[2] *Id.*, Chap. 5(1).

[3] *See* Office of Compliance Board regulations implementing the WARN Act, section 639.5(a)(1).

Procedures

Administrative

Under the GAOPA, only administrative processes would be available in a case where a GAO employee is affected by a RIF, including where notice requirements were not met. The GAOPA does not does not provide the right to file a civil action in case of violation of the rights under the RIF Order.

Judicial

In contrast, an employee covered by WARN provisions of the CAA who alleges a violation may elect to file a civil action. As a jury trial should be available to private sector employees,[1] a covered employee should be able to request a jury trial under the CAA as well.

As noted in comments, the GAOPA provisions on RIFs afford particularly broad discretion to the Comptroller General in establishing substantive rights. In fact, the statute makes no mention of any requirement that advance notice be given in case of a RIF.

The GAO employee Advisory Council on Civil Rights criticized the provisions added to GAOPA by the FY96 appropriations legislation, which "gave management wide latitude to draw RIF rules," as well as GAO's RIF Order issued pursuant to those provisions. According to the comment, "GAO's use of narrowly drawn competitive areas targeted people on a discriminatory basis," and permitting managers in each unit to decide how to make cuts resulted in the targeted RIFing of African-Americans and people who filed complaints on various grounds.

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[1] *See Bentley v. Arlee Home Fashions, Inc.*, 861 F.Supp. 65 (E.D. Ark. 1994).

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

Substantive Rights

Under the USERRA, all employees of the federal government, including employees of GAO performing service in the uniformed services, are protected from discrimination on the basis of such service, denial of reemployment rights, and denial of employment benefits. Like other federal employers, if it is "impossible or unreasonable" for GAO to reemploy a person otherwise entitled to reemployment, OPM shall ensure that the person is offered alternative employment of like seniority, status, and pay at a federal executive agency.[1]

The USERRA directs OPM to prescribe regulations implementing the provisions of the USERRA with regard to "executive agencies" as that term is defined in section 105 of title 5 of the U.S. Code, and GAO comes within the statutory definition of an "executive agency."[2] OPM's regulations spell out specific employee rights and protections under the USERRA in the civil service context.[3] For example, the regulations specify that an employee absent because of service in the uniformed services "is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency."[4] Upon reemployment, the employee "is generally entitled to be treated as though he or she has never left," receives credit for the entire period of absence for purposes of seniority and length of service, and is protected against discharge (except for cause) for a period after reemployment.[5]

On January 24, 1992, GAO issued Order 2353.1, which includes a description of GAO employees' right to return to employment after military duty. However, this Order was issued prior to the enactment of the USERRA in 1994, and is not consistent with it.

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1 *See* 38 U.S.C. 4314(a), (b), (c).

2 38 U.S.C. 4303(5), 4331(b)(1). The inclusion of GAO within the definition of "executive agency" is explained earlier in this study.

3 5 C.F.R. part 353.

4 5 C.F.R. 353.106, 353.208.

5 5 C.F.R. 353.107, 353.209.

Procedures

Administrative

The USERRA establishes several administrative processes to assure that rights and protections under the Act are provided to Federal Government employees, including those at GAO:

- ***Placement by OPM.*** When a legislative branch employer determines that it is impossible or unreasonable to reemploy an employee after service in a uniformed service, OPM will offer placement of the employee in the executive branch.[1] GAO employees and former employees might apply to OPM for this placement.

- ***Investigation and informal compliance efforts by Labor Department.*** An employee of an "executive agency," including GAO, who claims that the employer or OPM has failed or refused, or is about to fail or refuse, to comply with USERRA may file a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS).[2] The VETS staff will make reasonable efforts to ensure compliance, and will attempt to informally resolve the employment dispute brought to them.

- ***Representation by the Office of Special Counsel (OSC).*** If the Labor Department is unsuccessful in resolving the dispute, the employee may request that the complaint be referred to the OSC. If the Special Counsel is reasonably satisfied that the employee is entitled to the rights or benefits sought, the Special Counsel may, upon the employee's request, appear on behalf of the employee and initiate an action before the Merit Systems Protection Board (MSPB).[3]

- ***Adjudication of the complaint before the Merit Systems Protection Board.*** The employee may have the claim adjudicated before the MSPB. If the employee chooses not to be represented by the Special Counsel, or if the Special Counsel declines to represent the employee, the employee may submit the claim directly to the MSPB. The MSPB will adjudicate the complaint and may order the GAO to comply with the provision of the USERRA and to compensate the

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1 *See* 38 U.S.C. 4314; 5 C.F.R. 353.110.

2 *See* 38 U.S.C. 4322; 5 C.F.R. 353.210.

3 38 U.S.C. 4324(a).

employee for any loss of wages or benefits.[1]

A GAO employee who alleges a deprivation of USERRA rights and benefits may also submit a complaint under the administrative processes established under the GAOPA. For example, a GAO employee who suffers an appealable adverse action could bring a complaint before the PAB and allege that the action was taken in violation of USERRA.

Judicial

Although the USERRA makes provision for employees of private employers or state governments to file a civil action against the employer, this right is not made available to employees of the federal government.[2] The USERRA does provide for judicial review of a final order or decision of the MSPB, by petition to the U.S. Court of Appeals for the Federal Circuit.[3]

Future-Effective Changes Under the CAA

GAO and its employees are covered under the CAA provisions that apply the rights and protections of the USERRA, effective as of one year after this study is transmitted to Congress.[4]

EVALUATION

Substantive Rights

GAO is subject to the substantive provisions of the USERRA, which only apply throughout the federal government and are also made applicable under the CAA.

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1 38 U.S.C. 4324(b)-(c).

2 *See* 38 U.S.C. 4323.

3 38 U.S.C. 4324(d).

4 Section 204(d)(2) of the CAA, 2 U.S.C. 1314(d)(2).

Procedures

Administrative

Under present law, the USERRA provides a multi-step administrative process, including an investigation and informal efforts to resolve the dispute by the Labor Department, administrative adjudication before the MSPB, and the opportunity to be represented by the Special Counsel. The CAA provides counseling, mediation, and the option of an adjudicatory hearing and appeal. However, there is no provision for investigation of USERRA claims under the CAA.

One year after this study is transmitted to Congress, GAO and its employees will be treated as an employing office, and as covered employees, for purposes of section 206 of the CAA, which applies substantive rights and protections of the USERRA and specifies remedies that may be awarded in case of a violation.[1] GAO and its employees also will then become subject to the provisions of the CAA that establish administrative and judicial dispute-resolution procedures, and that forbid retaliation.[2]

Judicial

Unlike the CAA, which entitles covered legislative branch employees to file a civil action, USERRA does not entitle federal government employees alleging a violation of USERRA rights and protections to file a civil action. The CAA also provides that covered employees may obtain the same relief in district court as employees in the private sector. This available relief includes: requiring that the employer comply with applicable USERRA requirements; compensation for any loss of wages and benefits; liquidated damages equal to the lost wages and benefits, in situations where failure to comply was willful; and other remedies under the court's "full equity powers," including injunctions, temporary restraining orders, and contempt orders. Furthermore, assuming that GAO becomes subject to the judicial procedures of the CAA, GAO employees will gain the right to sue in district court for USERRA violations.

The USERRA provision forbidding retaliation is not listed among the provisions made applicable to covered legislative branch employees by the CAA.[3] However, the CAA contains its own provision forbidding retaliation, so GAO employees' right to file a civil action should extend to claims of retaliation.

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[1] *See* sections 206(a)(2)(B)-(C), (d)(2) of the CAA, 2 U.S.C. 1316(a)(2)(B)-(C), (d)(2).

[2] Sections 207 and 401-416 of the CAA, 2 U.S.C. 1317, 1401-1416.

[3] Section 206(a)(1)(A) of the CAA, 2 U.S.C. 1316(a)(1)(A).

EMPLOYEE POLYGRAPH PROTECTION ACT (EPPA)

Substantive Rights

The Employee Polygraph Protection Act of 1988 (EPPA) does not apply to GAO or its employees, nor does this legislation apply to any federal agencies or employees, except as made applicable by the CAA. EPPA restricts employers' use of lie detector tests of their employees.

Comments

GAO management has stated that GAO has never utilized polygraphs. As discussed above in the discussion of the GAOPA, the PAB has suggested that consideration be given to assigning to the PAB responsibility for enforcing the EPPA with respect to GAO. The Mid-Level Employees Council recommended that the law be amended to clearly designate the PAB as the arbiter of employee complaints dealing with EPPA matters.

EVALUATION

Under presently effective law and regulations, no rights and protections under EPPA are applicable to GAO and its employees. The EPPA does not apply to the federal sector.

Effective one year after this study is transmitted to Congress, however, the CAA will apply EPPA rights and protections to GAO and its employees under the same statutory provisions as now apply under the CAA at congressional employing offices.

THE AMERICANS WITH DISABILITIES ACT OF 1990
(Public Access Provisions)

Substantive Rights

Section 509 of the ADA provides that the rights and protections under the entire ADA shall apply to certain congressional instrumentalities, including GAO.[1] Titles II and III of the ADA, which relate to public access to public services and public accommodations, are therefore applicable in their entirety.[2]

Title II generally guarantees that a qualified person with a disability shall not "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[3] Title III, which applies to the private sector, generally prohibits discrimination against an individual "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation,"[4] and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with accessibility standards.[5]

Regulations

Under ADA titles II and III, the Attorney General has promulgated implementing regulations for matters other than public transportation,[6] and the Secretary of Transportation has promulgated regulations for public transportation matters.[7] According to GAO, these regulations do not apply to GAO.

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1 42 U.S.C. 12209(1).

2 Sections 201-245, 301-309 of the ADA, 42 U.S.C. 12131-12165, 12181-12189. Title II of the ADA has also been interpreted to apply to employment by a public entity, as well as public access. Insofar as title II applies to employment, it is covered by the earlier discussion of the application at GAO of the EEO provisions of the ADA.

3 42 U.S.C. 12132.

4 42 U.S.C 12182.

5 42 U.S.C. 12183.

6 *See* 42 U.S.C. 12134, 12186(b); 28 C.F.R. part 36.

7 *See* 42 U.S.C. 12143, 12149, 12164, 12186; 49 C.F.R. part 37.

Procedures

Administrative

Section 509(2) of the ADA authorizes instrumentalities, including GAO, to "establish remedies and procedures to be utilized with respect to the rights and protections" of the ADA made applicable to GAO.[1] GAO has stated that it is considering various appeal options for visitors, guests, or patrons at GAO buildings who have ADA complaints, and GAO has circulated a draft Order 2713.4 on discrimination complaint processing.

Under the draft Order, the individual must file a written complaint with GAO's Civil Rights Office (CRO) within 45 days of the incident or occurrence. CRO will attempt to mediate the matter. If mediation fails, CRO will issue a written decision. If the complainant is not satisfied with the final decision of CRO, he or she may appeal to the Office of the Assistant Comptroller General for Operations, which will review the matter and issue a final decision. No provision is made for an administrative hearing.

Judicial

The ADA public access provisions now in effect do not provide judicial processes in case of a complaint against GAO.

Future-Effective Provision Under the CAA

The CAA added a new paragraph (6) to section 509 of the ADA providing that the "remedies and procedures set forth in" section 717 of title VII shall be available to "any qualified person with a disability" who is a "visitor, guest, or patron" of an instrumentality of Congress, including GAO.[2] However, the provision specifies that the authorities of the EEOC under section 717 shall be exercised by the chief official of the instrumentality, who, in the case of GAO, is the Comptroller General. This new paragraph (6) is to become effective one year after this study is transmitted to Congress.

Administrative processes. Section 717 provides that the complainant shall be notified of the final action taken by the agency on any complaint of discrimination, and that the EEOC shall enforce through appropriate remedies and shall take appeals from the decision of the agency. ADA section 509(6) will require that these functions be the responsibility of the Comptroller General.

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[1] 42 U.S.C. 12209(2).

[2] Sec. 210 (g) of CAA.

Judicial processes. Section 717, which is made applicable by ADA section 509(6), also provides that the complainant may file a civil action in district court. The complainant may request a trial *de novo* by filing suit after receipt of final action taken by an agency, or if 180 days have passed since filing the complaint without the agency having rendered a final decision.

Relief. In case of a violation, section 717 authorizes the following relief: "the court may enjoin . . . unlawful employment practices and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."[1]

EVALUATION

Substantive Rights

All of the rights and protections of the ADA are made applicable to GAO by section 509. Accordingly, the provisions of the ADA regarding public access applicable to GAO are the same as those applicable to state and local governments and the private sector. Although all of the provisions of title II of the ADA were applied by the CAA, only certain provisions of title III were applied: 42 U.S.C. 12182 (prohibition of discrimination by public accommodations); 42 U.S.C 12183 (new construction and alteration in public accommodations and commercial facilities); 42 U.S.C 12189 (examinations and courses).

According to GAO, the substantive regulations promulgated by the Attorney General and the Secretary of Transportation implementing titles II and III of the ADA do not apply to GAO. By contrast, these regulations apply to state and local governments and the private sector under the ADA, and regulations [that are substantially the same] have been [adopted] by the Office of Compliance Board for congressional offices subject to the CAA.[2]

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[1] 42 U.S.C. 2000e-5(g), which is referenced in 42 U.S.C. 2000e-16(d).

[2] Even in the executive branch, the Attorney General is responsible, under Executive Order No. 12250, for reviewing agency regulations under section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), which prohibits discrimination on the basis of disability in conducting programs and activities, and for otherwise coordinating the implementation and enforcement of this provision. E.O. 12250, 45 Fed. Reg. 72995 (1980), reproduced as a note under 42 U.S.C. 2000d-1.

Procedures

Administrative and Enforcement

The administrative processes required at GAO by section 509(6) of the ADA differ from those under the CAA. Section 509(6) will require a process comparable to that used for EEO complaints, under which the complaining party initiates the proceeding and pursues the complaint. The legislation does not require an administrative hearing, and GAO's draft order does not provide for one.

The CAA adopts an enforcement-based process, under which the complaining individual files a charge with the General Counsel of the Office of Compliance, who investigates and decides whether he believes a violation may have occurred.[1] If so, the General Counsel may request mediation, and, if necessary, may file a complaint. The complaint is submitted to a hearing officer for an adjudicatory hearing, subject to appeal to the Office of Compliance Board. The charging party, while not entitled to file a complaint, may intervene as a party if the General Counsel does so.

The administrative process at GAO is similar to that in the executive branch under section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability in the programs and activities of federal agencies. The statute does not specify what procedures shall be applied, but many agencies have established an administrative process under which the agency investigates complaints, responds in writing, and provides an appeal within the agency.[2]

Judicial

In entitling individuals to sue GAO for violations of the public access provisions of the ADA, section 509(6) differs from the CAA. A final decision of the Office of Compliance Board is subject to review by the U.S. Court of Appeals for the Federal Circuit, but a complaint alleging that an office under the CAA violated the public access provisions may not be brought as a civil action in district court.[3] In this respect, the law for GAO will be similar to that for state and local governments and the private sector and for the executive branch, where violation of public access provisions of the ADA may be vindicated in district court.

The prohibition against retaliation under section 503 the ADA applies to individuals seeking public access to GAO, but an individual who claims such retaliation will not be entitled to a

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[1] 2 U.S.C 1331 (d).

[2] *See* 29 U.S.C. 794(a); 53 Fed. Reg. 25872 (1988) (promulgating regulations for 13 different agencies, based on a prototype prepared by the Department of Justice, *e.g.*, OPM regulations codified at 5 C.F.R. part 723).

[3] 2 U.S.C. 1410.

judicial remedy. Section 503 is not included among the ADA sections referenced in section 509(6) of the ADA, which makes the "remedies and procedures" of section 717 available at GAO. In comparison, the CAA does not prohibit retaliation against individuals who assert rights under the ADA public access provisions. The CAA does not make section 503 of the ADA applicable, and section 207 of the CAA, which forbids retaliation against covered employees, does not apply to individuals who use public services and accommodations who are not covered employees.[1]

Relief

The law at GAO would apply the remedies of section 717 of title VII in cases under title II and title III of the ADA. Section 717 provides relief tailored to EEO situations, including back pay. This differs from the CAA, which makes available the same relief as is available under the ADA in cases involving state or local governments or the private sector.

Section 203 of the ADA provides that, in case of a violation of title II, relief may be available either under section 717 or under title VI of the Civil Rights Act. Title VI does not specify what relief is available, but courts have found that injunctive relief, but not back pay or other damages, is available.[2] Section 308(a) of the ADA provides that, in the case of a violation of title III, either the remedies under title II (which forbids discrimination by public accommodations) or injunctive relief to alter facilities will be available.[3] Under title II of the Civil Rights Act, "preventive relief," including injunction, is available, but courts have found that damages are not available.[4]

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1 2 U.S.C. 1317.

2 *See, e.g., Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (5th Cir. 1981).

3 42 U.S.C. 12188(a).

4 42 U.S.C. 2000a-3(a); *see, e.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990).

CONCLUSIONS

Substantive Rights

GAO employees are currently granted substantive rights under most CAA laws, and, one year after this study is transmitted to Congress, the CAA will extend the substantive rights under additional laws to fill most remaining gaps in coverage. In addition, GAO employees enjoy many of the substantive civil service protections that apply generally in the executive branch. Consequently, employees at the instrumentality have certain rights and protections beyond those afforded legislative branch employees covered by the CAA. No employee comment endorsed the idea of transferring GAO from civil-service-based coverage to CAA coverage, and some employees suggested that it would be advisable to provide GAO employees with a statutory guarantee of all protections that apply in the executive branch.

Administrative Processes

GAO provides several avenues for administrative resolution of employee complaints and grievances on a wide range of subjects. However, one element of comprehensiveness and effectiveness is the independence of administrative procedures, and, in this respect, the picture at GAO is mixed. GAO employees can submit claims and appeals to the PAB in a number of areas — including EEO, appealable adverse actions, and prohibited personnel practices. These rights are in some respects broader in scope than those available under the CAA, which allows appeals to the Board only under the specific laws covered by the Act. The PAB's investigatory, enforcement, and oversight authorities in various areas, as well as the investigatory functions of GAO's Civil Rights Office, significantly exceed the investigation, enforcement, and oversight provided under the CAA. However, the PAB is administratively a part of GAO, and, while some employees commented that the PAB seems to act independently and without bias, others reported widespread employee dissatisfaction largely because of concerns about a lack of independence.

One recently imposed limitation on administrative enforcement at GAO — and a subject of dissatisfaction expressed in employee comments — is the provision in FY96 appropriations legislation forbidding the PAB to stay a RIF, even if discriminatory or otherwise a prohibited personnel practice. Like the MSPB for the executive branch, the PAB may generally stay agency action that is based on a prohibited personnel practice. It should be noted that such stay authority is outside the scope of remedies made available to covered employees by the CAA.

The legislative decision to establish the PAB as an office within GAO was originally intended to avoid subjecting GAO to the regulatory authority of the executive branch agencies that it may be called upon to audit. However, this decision is apparently undergoing reconsideration. GAO advised the Board that, because of budgetary considerations, the House Appropriations Committee has asked GAO to find a more appropriate placement for the functions that the PAB now performs, and that GAO has been considering this matter but has not come to any conclusions.

Judicial Processes and Relief

GAO employees either now have, or will be granted under the CAA, rights to use judicial procedures that are generally comparable to rights available to covered Congressional employees under the CAA. However, under certain applicable laws, the right to jury trial and to recover certain kinds of relief are not available to GAO employees. For example, GAO employees, like executive branch employees, arguably may not request a jury trial in cases under the ADEA, EPA, or FLSA, and may not recover compensatory damages under 42 U.S.C. 1981 or liquidated damages under the ADEA.

After the *Ramey* decision, GAO employees may not file a civil action in district court on a discrimination complaint after having appealed to the PAB. Employee comments expressed their dissatisfaction with this result, pointing out that executive branch employees may sue in district court and obtain a trial *de novo* even after appealing to the EEOC. However, under the CAA, covered employees must make a similar election, between either filing a civil action in district court or filing an administrative complaint with the Office of Compliance and thereby foregoing the right to file a civil action (although retaining the right to obtain appellate court review of final Board decisions).

In addition, the court in *Ramey* declined to decide whether GAO employees have the option of bringing a civil action on a discrimination complaint even before having appealed to the PAB. The resulting uncertainty can be resolved only through further litigation or by enactment of legislation.

Independent Process for Issuing Substantive Regulations

For most of the laws made applicable by the CAA, the substantive rights of GAO employees are generally defined not by GAO management, but by applicable statutes and Government-wide regulations adopted by executive branch agencies, or will be defined by regulations of the Office of Compliance Board when they go into effect with respect to GAO. However, in one significant exception, GAO's order establishing a labor-management program includes limits on appropriate bargaining limits and on the scope of bargaining that are more restrictive than the provisions in Chapter 71 or in regulations adopted by the Board under the CAA, based on FLRA regulations. In this respect, GAO has authority to define (and limit) employee rights that is not granted to employing offices under the CAA.

Furthermore, GAO has some authority to define its employees' rights with respect to certain general civil service protections outside the scope of the CAA. For example, amendments to GAOPA in the FY96 appropriations legislation granted the GAO wide latitude in establishing job retention rights in the conduct of RIFs. Certain employee comments were critical of the degree of latitude granted GAO in employment matters generally, especially the broad authority recently granted to GAO regarding RIFs.

The study also identified several issues regarding GAO that warrant further discussion:

FMLA

GAO is now subject to the FMLA provisions in civil service law, codified in Title 5 of the U.S. Code, and by OPM regulations implementing those provisions. However, section 202(c) of the CAA transfers coverage of GAO from the civil service provisions to the private sector provisions of the FMLA (codified in Title 29 of the U.S. Code), effective as of one year after this study is transmitted to Congress.[1] Section 202(c) will grant employees a private right of action that is unavailable for FMLA violations under civil service law, but will also reduce substantive FMLA protections, which are stronger under civil service law than in the private sector.

Section 202(c) covers Library of Congress as well as GAO, and both instrumentalities recommended that section 202(c) be rescinded. They explained that they have already established their FMLA leave systems in conformity with Title 5 requirements and within the parameters of the general federal leave system, and a shift to Title 29 would, in their view, be administratively disruptive without serving a significant public purpose.

GAO employees did not comment on this subject, but two unions of Library employees recommended that coverage be retained under Title 5, because Title 29 provides exemptions tailored to the private sector that are not appropriate to civil service employment. The unions also stated that the right to sue for civil damages under Title 29 would be "a rather extraordinary remedy when extended to federal employees," and that "administrative remedies which are typically available to federal employees would appear to be a more appropriate response to" an FMLA violation. On the other hand, section 202(c) furthers the general principle, expressed by Congress in enacting the CAA, that private sector law should apply to the legislative branch.

WARN

Employees at GAO do not now have protection under the WARN Act, but the CAA extends protection one year after this study is transmitted to Congress. However, GAO recommended that the application of WARN Act requirements to GAO should be rescinded, because greater employee protection is already available under a GAO Order governing RIFs. Applying to any RIF, no matter how small, the Order affords substantive rights generally more comprehensive than those under the WARN Act. Furthermore, while relief under the WARN Act is limited to 60 days' back pay, under GAO's Order the PAB may order the employee reinstated until the notice defect is corrected, in addition to back pay.

However, the WARN Act provisions of the CAA establish only a minimum level of notice protection, and do not foreclose the retention of additional protections in GAO's Order. Furthermore, the CAA provisions afford certain rights and protections not provided by GAO's Order. Employees who allege a violation of the WARN Act requirements of the CAA have the right to file a civil action — a right that is not available in case of a violation of the GAO Order.

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[1] Section 202(c) of the CAA, 2 U.S.C. 1312(c).

Furthermore, unlike the notice requirements that GAO management chose to incorporate in its RIF Order, the WARN Act provisions of the CAA are guaranteed in statute and cannot be modified or rescinded by any employing office.